# DOCKET

No. 07-6053
Title: Dwayne Giles, Petitioner
v.
California
Docketed: August 23, 2007
Lower Ct: Supreme Court of California
Case Nos.: (S129852)
Decision Date: March 5, 2007
Rehearing Denied: May 23, 2007
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Aug 20 2007 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 24, 2007) |
| Sep 18 2007 | Waiver of right of respondent California to respond filed. |
| Oct 3 2007 | DISTRIBUTED for Conference of October 26, 2007. |
| Oct 4 2007 | Response Requested . (Due November 5, 2007) |
| Nov 2 2007 | Order extending time to file response to petition to and including December 5, 2007. |
| Nov 29 2007 | Brief amicus curiae of Richard D. Friedman filed. |
| Dec 5 2007 | Order further extending time to file response to petition to and including December 12, 2007. |
| Dec 11 2007 | Brief of respondent California in opposition filed. |
| Dec 21 2007 | Reply of petitioner Dwayne Giles filed. (Distributed) |
| Dec 26 2007 | DISTRIBUTED for Conference of January 11, 2008. |
| Jan 11 2008 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED The brief of petitioner is to be filed on or before Wednesday, February 20, 2008. The brief of respondent is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court. |
| Jan 30 2008 | SET FOR ARGUMENT ON Tuesday, April 22, 2008. |
| Feb 11 2008 | Record received from the Supreme Court of California. (1 box) |
| Feb 20 2008 | Joint appendix filed. (Statement of costs filed) |
| Feb 20 2008 | Brief of petitioner Dwayne Giles filed. |
| Feb 22 2008 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. |
| Mar 5 2008 | CIRCULATED. |
| Mar 19 2008 | Brief of respondent California filed. (Distributed) |
| Mar 19 2008 | Brief amicus curiae of National Crime Victim Law Institute filed. (Distributed) |
| Mar 26 2008 | Brief amici curiae of National Association of Counsel for Children, et al. filed. (Distributed) |
| Mar 26 2008 | Brief amicus curiae of Richard D. Friedman filed. (Distributed) |
| Mar 26 2008 | Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), et al. filed. (Distributed) |
| Mar 26 2008 | Brief amicus curiae of National Association to Prevent Sexual Abuse of Children's National Child Protection Training Center filed. (Distributed) |
| Mar 26 2008 | Brief amicus curiae of Battered Women's Justice Project and Other Domestic Violence |

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|---|---|
| | Organizations filed. (Distributed) |
| Mar 26 2008 | Brief amici curiae of Illinois, et al. filed. (Distributed) |
| Apr 10 2008 | Reply of petitioner Dwayne Giles filed. (Distributed) |
| Apr 22 2008 | Argued. For petitioner: Marilyn G. Burkhardt, Los Angeles, Cal. For respondent: Donald E. De Nicola, Deputy State Solicitor, Los Angeles, Cal. |

# PETITION FOR WRIT OF CERTIORARI

08-20-07

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No. 07-6053

IN THE

SUPREME COURT OF THE UNITED STATES

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DWAYNE GILES,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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On Petition For Writ of Certiorari
To The California Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

In *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule "extinguishes confrontation claims on essentially equitable grounds." The question presented by this case is:

Does a criminal defendant "forfeit" his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court included the State of California and Dwayne Giles. There are no parties to the proceedings other than those named in the petition.

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No. _____

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DWAYNE GILES,

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v.

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On Petition For Writ of Certiorari
To The California Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Dwayne Giles, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Supreme Court filed on March 5, 2007.

## OPINIONS BELOW

The opinion of the California Supreme Court was filed on March 5, 2007, and is attached as Appendix A. It is reported at 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (2007). The California Supreme Court's one-page order denying rehearing was filed on May 23, 2007, and is attached as Appendix B. The opinion of Division Six of the Second District Court of Appeal of the State of California was filed on October 25, 2004, and is attached as Appendix C. The Court of Appeal's order modifying its opinion and denying rehearing was filed on November 22, 2004, and is attached as Appendix D. The Court of Appeal's modified opinion is reported at 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004).

## JURISDICTION

The decision of the California Supreme Court was filed on March 5, 2007. Petitioner filed a timely Petition for Rehearing on March 23, 2007. The California Supreme Court denied the Petition for Rehearing on May 23, 2007. This petition is filed within 90 days of that date. Rule 13. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

## STATEMENT

Petitioner was convicted after a jury trial in California state court of murdering his former girlfriend Brenda Avie. At trial, the prosecution, over petitioner's objection, admitted out-of-court statements that Avie made to a police officer about a prior assault by petitioner. While his appeal was pending this Court issued its decision in *Crawford* v. *Washington*, *supra*, 541 U.S. 36. At the request of the Court of Appeal, the parties filed briefs on *Crawford's* impact on petitioner's case. The California Court of Appeal and the California Supreme Court rejected petitioner's argument that the admission of Avie's testimonial hearsay violated the Confrontation Clause and affirmed his conviction.

### 1. Trial Proceedings

#### a. Admission of Avie's Testimonial Hearsay Statements

The prosecution, in its case-in-chief and over petitioner's objection, presented the testimony of a Los Angeles police officer who interviewed Brenda Avie on September 5, 2002 about an assault by petitioner. The officer testified that he and his partner went to an address in Los Angeles County on September 5, 2002. Petitioner answered the door, apparently agitated. Avie was sitting on the bed, crying. The officer interviewed Avie while his partner interviewed petitioner separately. Avie told the officer that she had been talking on the phone

with a female friend when her boyfriend, petitioner, got angry with her and accused her of having an affair with the friend. Avie ended the phone call and argued with petitioner. He lifted her off the floor, put her down, and choked her. She broke free and fell to the floor. He climbed on top of her and punched her face and head. She broke free and crawled onto the bed. Then he opened the blade of a folding knife, held it about three feet from her, and said, "If I catch you fucking around I'll kill you." The officer didn't see any physical marks on her but felt a bump on her head. RT 611-618.

The trial court admitted the evidence under California Evidence Code section 1109, which permits the admission of evidence of prior acts of domestic violence to prove the defendant has a propensity to commit acts of domestic violence, and California Evidence Code section 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury on the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. RT 1-2, 606-610; *People* v. *Giles, supra*, 19 Cal.Rptr.3d at 846.

The testimonial hearsay about the prior assault also permitted the trial court to instruct the jury that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he "had a disposition to commit another offense involving domestic violence" and to further infer that he was "likely to commit and did commit" the charged murder. CT 92.

**b. Evidence of the Homicide**

On the night of September 29, 2002, petitioner was socializing with his new girlfriend, Tameta Munks, his friend, Marie Banks, and his niece, Veronica Smith, in the garage behind his grandmother's house, where he was living. He received a telephone call from Avie and then asked Munks to leave, which she did. Shortly thereafter, Avie arrived. Banks noted that Avie argued with petitioner, and he tried to pacify her. *People* v. *Giles, supra,* 152 P.3d at 435-436; RT 917-920, 926.

Smith went inside the house. Avie left with Banks, intending to go to her father's house. On the way, she saw Munks. She told Banks that she was going back because she didn't intend to let "that bitch" visit petitioner. Avie returned to petitioner's home by herself. *Giles, supra,* 152 P.3d at 436; RT 922, 927.

Smith heard Avie and petitioner talking outside but couldn't tell what they were saying. Then she heard Avie yell "Granny" and heard a series of gunshots. Smith ran outside. Avie was lying on her back in the driveway. Petitioner was standing nearby, holding a nine-millimeter handgun. Avie did not have a weapon. Giles, supra, 152 P.3d at 436.

The autopsy revealed that Avie had six gunshot wounds in her torso area, two of which were fatal. The coroner testified that one wound was consistent with her holding up her hand when she was shot, one was consistent with her having turned to the side when she was shot, and one was consistent with her

being shot while she was lying on the ground. *Giles, supra,* 152 P.3d at 436; RT 376-377.

**c. Petitioner's Testimony**

Petitioner testified and claimed self-defense. He had dated Avie for several years. He broke up with her in January of 2002, but she continued to call and harass him. *Giles, supra,* 152 P.3d at 435-436; RT 638.

He knew that she was volatile and had a history of violence, particularly when she was jealous. She had vandalized his car and his house. She had shot a man during an argument. She had threatened to kill him and his former girlfriend if she saw them together. She had an army-style knife. She had brandished a knife at a woman, after saying she wanted to "kill that bitch." She had attacked him with a knife in a fit of jealousy. She had brandished a knife at Munks, after saying she wanted to "check that bitch." *Giles, supra,* 152 P.3d at 436, 443-444; RT 633-636, 638-641, 686-687, 693-695. Other defense witnesses corroborated some of these incidents. RT 698-708, 734-735, 741-742.

Petitioner testified that when Avie telephoned him on the night of the shooting, he told her that Munks was there. She got upset and threatened to kill Munks. When Avie arrived and found Munks gone, she threatened to kill Munks when she saw her. He told her to leave, but she didn't. Eventually, he told everyone to leave. *Giles, supra,* 152 P.3d at 436; RT 643, 645, 651.

After Avie and Banks left, he stayed in the garage, putting his CDs away. When Avie appeared in the driveway, she said, "I know that bitch going to come back here. I'm going to kill you and that bitch." He told her to leave, but she refused. When she started to run towards him, he grabbed his uncle's loaded gun, which in the garage. He was very afraid that she had a weapon, although he didn't see one because it was dark. As she charged directly at him, he aimed the gun at her, closed his eyes, and fired several shots. He did not intend to kill her. *Giles, supra,* 152 P.3d at 436; RT 646-648.

**d. Conviction and Sentencing**

On April 3, 2003, the jury convicted petitioner of first degree murder and found a firearm allegation true. CT 162. He was sentenced to prison for 50 years to life. CT 177-178.

**2. The Decision of the California Court of Appeal**

Petitioner appealed. On March 8, 2004, while his appeal was pending in Division Six of California's Second Appellate District, this Court issued its decision in *Crawford* v. *Washington, supra,* 541 U.S. 36. At the request of the Court of Appeal, both parties filed briefs regarding *Crawford's* impact on petitioner's case.

On October 25, 2004, the Court of Appeal affirmed the judgment of conviction. *People* v. *Giles,* 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004). The court rejected petitioner's argument that the admission of Avie's hearsay statements to

the officer violated his Sixth Amendment right of confrontation under *Crawford*. 19 Cal.Rptr.3d at 846-847. The court held that the rule of forfeiture by wrongdoing barred petitioner from raising a Confrontation Clause objection to the admission of Avie's out-of-court statements to the officer, because petitioner caused her unavailability at trial by killing her. *Id.* at 847-848. He forfeited his confrontation rights, the court held, even though there was no evidence that he killed Avie for the purpose of preventing her testimony at some future trial. *Id.* at 848.

### 3. The Decision of the California Supreme Court

The California Supreme Court affirmed. *People* v. *Giles*, 152 P.3d 433 (Ca. 2007). The court adopted the equitable forfeiture by wrongdoing rule in the State of California for all cases. *Id.* at 444-446. The court concluded that the forfeiture rule does not contain an intent-to-silence element. *Id.* at 443. Rather, it found that "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." *Id.* at 442.

California's equitable forfeiture rule requires a showing that the witness is unavailable for trial and the defendant caused the witness's unavailability by an intentional criminal act. *People* v. *Giles*, *supra*, 152 P.3d at 446. To apply the forfeiture rule, the trial court must find the elements of the rule are proven by a preponderance of the evidence. *Ibid.* In making this finding, the trial court may consider the proffered hearsay, but the hearsay must be supported by inde-

pendent corroborative evidence. *Ibid.* If the elements are proven, the defendant forfeits his right to object under the Confrontation Clause to the admission of the witness's hearsay statements. However, the defendant may still object to the admission of the statements on hearsay and other statutory grounds. *Id.* at 446-447.

The California Supreme Court relied on *Reynolds* v. *United States*, 98 U.S. 145, 158 (1879) and *Crawford* v. *Washington*, *supra*, 541 U.S. at 62, to justify its holding that intent to silence is not an element of the forfeiture rule. *People* v. *Giles*, *supra*, 152 P.3d at 437-439, 442-443. Although the court acknowledged that the facts of *Reynolds* involve witness tampering, the court found that *Reynolds* "described the rule without reference to a defendant's motivation," *id.* at 442, and "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." *Id.* at 438, n. omitted. Moreover, the court found that *Crawford's* characterization of the rule as a "forfeiture" rather than as a waiver and as based on "essentially equitable grounds" strongly suggests that the applicability of the rule does not depend on the defendant's motive. *Id.* at 442-443. Accordingly, the court concluded:

> Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's

> unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

*Id.* at 443.

## REASONS FOR GRANTING THE PETITION

All courts that have faced the issue agree that a person who deliberately intends to, and actually prevents a witness from testifying, loses the right to confront that witness. The Court articulated this rule of forfeiture by wrongdoing in *Reynolds v. United States, supra*. Federal and state courts applied the forfeiture rule for some thirty years only in cases where there was witness-tampering. The rule was codified in Federal Rule of Evidence 804(b)(6) in 1997 and specifically requires that the defendant intend to prevent the witness from testifying. No pre-*Crawford* case held that the forfeiture rule was satisfied because the defendant was the procuring, but not the intentional, cause of the witness's absence.

In *Crawford*, this Court reformulated the constitutional standard required by the Confrontation Clause and held that an absent witness's testimonial hearsay is admissible only if the defendant has had an opportunity to cross-examine the witness. 541 U.S. at 53-54. This stringent standard for the admission of testimonial hearsay excludes some hearsay that would have been admitted under the former standard established in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which required

only that the hearsay be reliable. *Crawford* recognized that the rule of forfeiture by wrongdoing is an exception to the new standard and "extinguishes confrontation claims on essentially equitable grounds." *Crawford, supra*, 541 U.S. at 62.

After *Crawford*, some courts, citing equitable grounds, have expanded the forfeiture exception by eliminating any requirement of proof that the defendant intended to silence the witness. This recent development has created a deep split with other courts that apply the forfeiture rule, as in *Reynolds*, only when the defendant deliberately acts to prevent a witness from testifying. The forfeiture issue arises in every case when witness tampering is alleged, and the expanded rule applies in every homicide case and may arise in any domestic violence and sexual assault case when it is asserted that the defendant may be the reason for the witness's reluctance or refusal to testify.

This case squarely presents the question of whether a defendant forfeits his confrontation right when the declarant's absence from trial is an unintended result of the defendant's wrongful act. It is a pressing question of national importance that the lower courts have thoroughly evaluated but cannot agree upon. Only this Court may resolve the split among the lower courts.

## I. Ten State Supreme Courts And One Federal Circuit Court of Appeals Have Split On The Question Presented.

Since *Crawford* was decided in March of 2004, ten state supreme courts and one federal circuit court of appeals have ruled on the question whether

intent to silence is an element of the forfeiture by wrongdoing rule. These courts have split on the issue six to five.

Five state supreme courts, including the court below, and the United States Court of Appeals for the Sixth Circuit have held that intent to silence is not an element of the forfeiture rule. *State* v. *Mason*, 2007 Wash. LEXIS 553, *18-20 (Wash. 2007); *State* v. *Jensen*, 727 N.W.2d 518, 536 (Wis. 2007); *State* v. *Mechling*, 633 S.E.2d 311, 326 (W.Va. 2006); *State* v. *Meeks*, 88 P.3d 789, 794 (Kan. 2004), overruled in part on another ground by *State* v. *Davis*, 158 P.3d 317, 322 (Kan. 2006); *United States* v. *Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005).

Five state supreme courts have reached the opposite conclusion. *State* v. *Romero*, 156 P.3d 694, 703 (N.M. 2007), petition for certiorari filed July 6, 2007, No. 07-37; *People* v. *Stechly*, 870 N.E.2d 333, 353 (Ill. 2007); *People* v. *Moreno*, 160 P.3d 242, 247 (Colo. 2007); *Commonwealth* v. *Edwards*, 830 N.E.2d 158, 170 (Mass. 2005); *State* v. *Fields*, 679 N.W.2d 341, 347 (Minn. 2004).

The forfeiture rule has arisen in different types of prosecutions. In six of these eleven cases, the forfeiture rule involved the use of a murder victim's testimonial hearsay: petitioner's case, *Romero*, *Jensen*, *Garcia-Meza*, *Mason*, and *Meeks*. The remaining cases involved witnesses who survived the crime charged but did not testify. *Stechly* and *Moreno* both involved the use of the victim's testimonial statements in prosecutions for sexual assault of a child. *Mechling* involved the use of the testimonial statements of a domestic violence victim. *Edwards* and *Fields*

involved the forfeiture rule in the context of influencing or threatening a witness to a crime.

These courts have reached diametrically opposite conclusions based on the same pronouncements by this Court in *Reynolds*, *Crawford*, and *Davis* v. *Washington*, 547 U.S. ___, 126 S.Ct. 2266, 2279-2280 (2006).

The lower courts differ radically in their interpretation of *Reynolds v. United States, supra.* For example, the California Supreme Court found that *Reynolds* "described the [forfeiture] rule without reference to a defendant's motivation," 152 P.3d 442, and "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." *Id.* at 438, fn. omitted. The Illinois Supreme Court reached the opposite conclusion, finding that "the rule laid down by the Supreme Court in *Reynolds* contemplates an accused intentionally procuring a witness' absence," *People* v. *Stechly, supra,* 870 N.E.2d at 350, and that "*Reynolds* unequivocally imposed an 'intent' requirement." *Id.* at 349.

The lower courts sharply disagree over the inference to be drawn from the use of the term "forfeiture" by wrongdoing. The California Supreme Court found that the "forfeiture" label strongly suggests that broad forfeiture principles apply. *People* v. *Giles, supra,* 152 P.3d at 442-443. In contrast, the New Mexico Supreme Court, in finding intent to silence necessary, concluded, "we cannot say the distinction between waiver and forfeiture has proved helpful, although we

agree that forfeiture is the preferred term." *State* v. *Romero, supra,* 156 P.3d at 702-703.

The California Supreme Court and the Sixth Circuit interpreted the use of the phrase "essentially equitable grounds" as endorsing an expansive forfeiture rule based upon their own sense of fairness. *Giles, supra,* 152 P.3d at 442-444; *United States* v. *Garcia-Meza, supra,* 403 F.3d at 370-371. In contrast, the New Mexico Supreme Court found it improper "to balance a constitutional right against a somewhat vague and amorphous sense of what ought to be permitted." *State* v. *Romero, supra,* 156 P.3d at 702.

The Court's discussion of the forfeiture rule in section IV of *Davis* v. *Washington, supra,* did not resolve the question. Seven of the eleven cited cases were decided after *Davis*. The supreme courts of New Mexico, Colorado, and Illinois interpreted the comments in *Davis* to mean that the forfeiture doctrine requires intent to prevent testimony. These courts focused in particular on two pronouncements in *Davis, supra,* 126 S.Ct at 2280. The first is that the doctrine is codified in Federal Rule of Evidence 804(b)(6), which has an intent to silence element. The second is that the forfeiture rule applies to defendants who "seek to undermine the judicial process by procuring or coercing silence from witnesses and victims" and whose conduct "destroy[s] the integrity of the criminal-trial system." *State* v. *Romero, supra,* 156 P.3d at 701, 703; *People* v. *Moreno, supra,* 160 P.3d at 244-245; *People* v. *Stechly, supra,* 870 N.E.2d at 350.

The supreme courts of Wisconsin, Washington, and West Virginia read *Davis* to permit an expansive forfeiture doctrine. They focused on *Davis'* reaffirmation of *Crawford's* statement that the forfeiture rule "extinguishes confrontation claims on essentially equitable grounds." *Giles, supra*, 152 P.3d at 443, n. 5; *Jensen*, 727 N.W.2d at 531, n. 12; *Mason, supra*, 2007 Wash. LEXIS 553 at *17; *Mechling, supra*, 633 S.E.2d at 325 (quoting this statement in context). All of these courts ignored *Davis'* statement that Federal Rule 804(b)(6) codifies the forfeiture doctrine. They did not attempt to explain any of language in *Davis* that contradicts their expansive views of the forfeiture rule. The California Supreme Court simply asserted that such language "only describes the traditional form of witness tampering cases . . . without limiting the forfeiture doctrine to witness tampering cases. *Giles, supra*, 152 P.3d at 443, n. 5.

The essential conflict is between those who interpret the forfeiture rule expansively to mitigate the stringent new standard that *Crawford* adopted and those who interpret it as it has traditionally been applied since *Reynolds*, and who see it as necessary to enforce the stringent new standard that *Crawford* adopted. The Wisconsin Supreme Court summarized the former view: "In essence, we believe that in a post-*Crawford* world the broad view of forfeiture by wrongdoing . . . utilized by various jurisdictions since *Crawford's* release is essential." *State* v. *Jensen, supra*, 727 N.W.2d at 535. The Colorado Supreme Court has summarized the latter view:

> To find the forfeiture of a protection so integral to the truth-seeking process, quite apart from any design or attempt by the defendant to subvert that process, would not only divorce the forfeiture by wrongdoing doctrine from its very reason for existing but would emasculate the newly-articulated cross-examination guaranty of the Confrontation Clause. It seems hardly conceivable that the Supreme Court would understand the confrontation clause to guarantee so absolutely a particular method of testing the reliability of testimony, see *Crawford*, 541 U.S. at 68, and yet allow criminal defendants to be stripped of that guarantee so casually and virtually by definition in entire classes of prosecutions.

*People* v. *Moreno*, *supra*, 160 P.3d at 246-247.

The lower courts are well aware of the diverging lines of authority. E.g., *People* v. *Moreno*, *supra*, 160 P.3d at 245-246; *People* v. *Stechly*, *supra*, 870 N.E.2d at 349, 351-352; *State* v. *Romero*, *supra*, 156 P.3d at 701-702; *Gonzales* v. *State*, 195 S.W.3d 114 (Tex. Crim. App. 2006), cert. denied, 127 S.Ct. 564 (2006) (acknowledging deep split of authority over the intent issue but declining to decide the issue because intent to silence could be inferred from the record). They are facing the same types of factual situations, reading the same precedents, considering the same arguments, and reaching opposite conclusions on the most important exception to the Confrontation Clause. They are hopelessly divided, and no new arguments are likely to emerge.

Only this Court can resolve the conflict over whether the forfeiture by wrongdoing exception to the Confrontation Clause requires proof of an intent to

silence the witness. A prompt decision is necessary to ensure uniform application of the fundamental right to confrontation.

## II. This Case Presents An Issue Of National Importance Because The Broad Forfeiture Rule Adopted By The Court Below Emasculates The Right To Confrontation In All Homicide Cases And In Many Other Prosecutions And Creates A Perverse Incentive For Prosecutors To Introduce Hearsay Rather Than Provide An Opportunity For Cross-examination.

The California Supreme Court's expansive interpretation of the forfeiture by wrongdoing rule has broad implications for many criminal cases. A forfeiture rule that is triggered by mere causality emasculates the right to confrontation guaranteed in *Crawford*, because this exception will swallow the rule and it creates a perverse incentive for prosecutors to introduce hearsay rather than provide an opportunity for cross-examination.

The expanded forfeiture rule has wide application because it makes forfeiture of confrontation rights virtually automatic in every homicide case. For the first time, an entire class of defendants has been stripped of the right to confrontation.

The expanded forfeiture rule also applies to cases where the witness could testify but does not. Prosecutors have argued that the defendant forfeits the right to confrontation whenever the witness's absence is due to the trauma of the criminal act. Domestic violence and sexual abuse cases can present the situation. E.g., *People* v. *Stechly*, *supra*, 870 N.E.2d at 340-341, 349 (noting the

state's argument that the trauma of sexual assault made the child witness unavailable to testify); Adam M. Krischer, *"Though Justice May be Blind, It Is Not Stupid," Applying Common Sense To Crawford In Domestic Violence Cases*, 38 PROSECUTOR at 14 (Nov.-Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeited their right to confront their victims). Thus, once there is plausible evidence that the defendant is responsible for the traumatising crime, the victim's testimonial hearsay would be admitted. This is so even though a witness may have independent, personal, and sometimes self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships. *State v. Mechling, supra*, 433 S.E.2d at 325, n. 12 (recognizing that some domestic violence complainants refuse to testify because initial accusations were untrue or exaggerated or an attempt to gain an advantage in other proceedings); *State* v. *Romero*, 133 P.3d 842, 863-64 (Ct. App. (concurring opinion) aff'd. 156 P.3d 694 (N.M. 2007) (same).

The expanded rule of forfeiture by wrongdoing also creates a perverse incentive that undermines the prosecution's incentive to locate and present the witness when testimonial hearsay is available. *Cf. Mechling, supra*, 433 S.E.2d at 314 (subpoena mailed but not physically served, and complaining witness did not appear at trial where only hearsay offered). Child witnesses are particularly problematic because parents or others may desire to avoid their appearance at

trial. Richard D. Friedman, *Children As Victims And Witnesses In The Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Prob. 243, 254 (Winter 2002). In many cases the prosecution prefers testimonial hearsay. The prosecution typically introduces testimonial hearsay through law enforcement personnel who may be perceived to be neutral and more credible than the declarant, particularly because the hearsay cannot be modified or recanted by the witness who only heard the statement. [1] Thus, the broad rule of forfeiture adopted by the court below undermines the purpose of *Crawford* by creating an exception that applies in all homicides and many other cases and by encouraging trial by hearsay rather than by confrontation.

## III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case is an ideal vehicle for the Court to resolve the question whether intent to prevent testimony is an element of the forfeiture by wrongdoing rule. This constitutional issue is starkly presented here because it is the only disputed

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[1] "Of course a prosecutor who has useful hearsay might prefer to offer it, since bringing the speaker to court may be hard or costly or time-consuming. Disappointing as well: The speaker may be frightened or reluctant, and testifying visibly on the record under oath and subject to cross may persuade him to back away from what was more easily said in private to a sympathetic audience of prosecutors and agents. Hence prosecutors sometimes prefer to offer statements rather than produce the speaker, and it is not always easy to distinguish between the effort one might make to find and produce a speaker and an effort to show he cannot be produced." Mueller & Kirkpatrick, EVIDENCE, § 8.87 at 977 (3rd ed. 2003).

material issue of fact or law. There is no dispute that Avie was genuinely unavailable to testify at trial, that petitioner caused her unavailability, and that he had no opportunity to cross-examine her prior to trial. Moreover, there is no dispute that he did not, even in part, cause her unavailability to prevent her from testifying, since the Court of Appeal expressly found that "no evidence" indicated he shot her with the intention of preventing her testimony at some future trial. *Giles, supra,* 19 Cal.Rptr. at 848. Finally, as the California Supreme Court found, there is no dispute that her statements to the police officer were "testimonial in nature." *Giles, supra,* 152 P.3d at 438, citing *Davis, supra,* 126 S.Ct. at 2273-2274, 2278-2279. Thus, the only remaining issue is the question of law as to whether the forfeiture rule allows the admission of testimonial hearsay without proof that petitioner caused Avie's absence at trial to prevent her testimony.

The admission of the testimonial hearsay cannot be excused as harmless error. Petitioner had a substantial claim of self-defense. There were no witnesses to the shooting, it occurred outdoors in the dark, a few minutes after Avie returned unexpectedly to petitioner's home after angrily encountering his new girlfriend, Tameta Munks. Petitioner knew that Avie was a violent and jealous person, and this was corroborated by independent witnesses. She threatened the lives of petitioner and Munks, and then she charged toward petitioner, prompting the shooting. Under these circumstances, the testimonial hearsay about the prior assault was critical to the prosecution's case because it was the only

testimony that suggested that petitioner would violently attack Avie and because it triggered a propensity instruction. The instruction was very adverse to petitioner because it stated that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he "had a disposition to commit another offense involving domestic violence" and to further infer that he was "likely to commit and did commit" the charged murder. RT 983; CT 92. The jury followed the instruction and rejected petitioner's claim of self-defense.

Neither the California Supreme Court nor the Court of Appeal considered harmless error as a possible alternate ground of decision. The supreme court, however, did cite Avie's testimonial statement to support its conclusion that there was sufficient proof to support the finding that the homicide was unlawful, and that petitioner had forfeited his right to confrontation. *Giles, supra,* 152 P.3d at 447. Thus, Avie's statement was central to the verdict, and its admission was not harmless error.

The only issue remaining to be determined is the question presented by this case: whether the rule of forfeiture by wrongdoing requires that petitioner intend to silence the witness. That issue is decisive to this case and has irreconcilabl divided the courts below, making this case an ideal vehicle to hear and determine this important constitutional issue.

## IV. The Expanded Forfeiture Rule Is Not Supported by This Court's Cases on the Confrontation Clause or the Rule of Forfeiture by Wrongdoing

**Applied at Common Law and Adopted in *Reynolds*, Nor is the Right to Object Under *Crawford* an Inequitable Benefit to Petitioner.**

**A. The California Supreme Court's Expanded Forfeiture Rule Violates *Crawford's* Command That The Right To Confrontation Must Be Based On The Law As It Existed When The Sixth Amendment Was Adopted.**

The California Supreme Court's expanded forfeiture rule is a post-*Crawford* development aimed at eliminating the intent-to-silence requirement found in the common law and early American precedents supporting the forfeiture rule in *Reynolds*. The court's approach is inconsistent with the historical underpinnings of the Confrontation Clause established in *Crawford*.

In *Crawford*, this Court emphasized that the right of confrontation, and any exception to it, were to be found in the original understanding of the purpose and scope of the Confrontation Clause. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. *Crawford, supra*, 541 U.S. at 54. Only the forfeiture rule, and perhaps the dying declaration, were exceptions to the Confrontation Clause when the Sixth Amendment was adopted. *Id.* at 56, n. 6 (discussing dying declaration). The forfeiture rule clearly was limited to deliber-

ate activities aimed at preventing the witness from testifying. *Reynolds* cited only authorities involving post-crime activities by the defendant aimed at interfering with the witness's appearance at trial. The principal common law precedents were Lord Morley's Case in 1666, 6 How. St. Tr. 770 (1666), and Harrison Case in 1692, 12 How. St. Tr. 833 (1692), both of which involved allegations that witnesses were made unavailable. *Reynolds* also citied early American case law and commentaries, and summarized the forfeiture rule as follows:

> In Regina v. Scaife (17 Ad. & El. N. S. 242), all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. Drayton v. Wells, 1 Nott & M. (S. C.) 409; *Williams v. The State*, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446.

*Reynolds, supra*, 98 U.S. at 158-159.

Thus, the forfeiture rule described in *Reynolds* in 1879 was derived from some two hundred years of case law that consistently applied the rule only when there was evidence that the defendant intentionally prevented the witness from testifying. Other historical evidence supports this conclusion. The existence of the dying declaration exception to the hearsay rule, which predates the Constitution, would have been unnecessary if the forfeiture rule lacked an intent-

to-silence element. Moreover, the California Supreme Court has not cited any authority remotely contemporaneous with the adoption of Sixth Amendment, or of *Rey-nolds, supra,* that holds that the commission of a crime alone is sufficient to support a forfeiture. As the lower court recognizes, *Giles, supra,* 152 P.3d at 439-40, the application of the forfeiture rule in the thirty years prior to *Crawford* focused on cases of deliberate witness tampering. Indeed, the forfeiture rule has been applied consistently only to witness tampering cases for more than 300 years.

The only reasonable conclusion that can be drawn from the precedents cited in *Reynolds,* the case law, the dying declaration doctrine, and the lack of pre-*Crawford* authority applying the expansive rule adopted in California, is that it was well understood by all that the forfeiture rule required a deliberate act aimed at silencing a potential witness. Consequently this recent development in the law of the Confrontation Clause must be rejected.

**B. The California Supreme Court's Rationale for the Expanded Forfeiture Rule Is Deeply Flawed Because It Uses the Protection Provided by the Right to Confrontation as the Equitable Justification for Forfeiting It.**

**1. The Lower Court's Rationale that the Protection Provided by the Right of Confrontation is an Inequitable Benefit is Inconsistent with the Purpose of Constitutional Rights.**

The core of the California Supreme Court's argument is that petitioner should not be able to benefit from his act of homicide by excluding the victim's testimonial hearsay. *Giles, supra,* 152 P.3d at 443 (adopting the Court of Appeal's statement that "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts"). This argument is fundamentally flawed for two reasons. First, it requires that the right of confrontation be viewed as a "benefit." Constitutional rights, however, are not "benefits" of a crime. They do not derive from the crime at all, and certainly no one commits crimes in order to obtain constitutional rights in a criminal trial. Rather, confrontation and the other constitutional rights are the personal rights of the individual, inherent in citizens and those tried in our courts. *Faretta v. California,* 422 U.S. 806, 819, 829-830 (1975) (identifying notice, confrontation and compulsory process as personal rights). They are the fundamental law of the land and specifically limit the government's power to use certain types of evidence to obtain convictions. Confrontation, in particular, is a procedural right deemed necessary to ensure the fairness of the criminal process. *Crawford, supra,* 541 U.S. at 50-51, 61-63. To treat a constitutional right as a benefit of a crime, and particularly one that can be lost because it is a benefit, is to ignore the nature of constitutional rights.

This Court in *Davis* rejected the California Supreme Court's proposition that constitutional rights may be forfeited because they provide protection. "We

:nay not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." *Davis, supra,* 126 S.Ct. at 2280 (citation omitted.) Moreover, this Court's precedents on the loss of the right to confrontation all focus on whether the defendant acted to knowingly forego that right. *Reynolds* v. *United States, supra,* 98 U.S. 145, 160 (defendant's deliberate concealment of witness was choice to rely on weakness of government's case rather than cross-examine the witness); *Diaz* v. *United States,* 223 U.S. 442 (1912) (voluntary absence from trial waives Sixth Amendment rights); *Illinois* v. *Allen,* 397 U.S. 337 (1970) (defendant's disruptive conduct after warning justified removal from courtroom until he behaved); cf. *Davis* v. *Washington, supra,* 126 S.Ct. at 2280 (forfeiture rule applies to those who seek to undermine the integrity of the judicial process by procuring the silence of witnesses); *Motes* v. *United States,* 178 U.S. 458 (1900) (defendants did not forfeit their confrontation rights in absence of evidence connecting defendants with witness's absence from trial). The California Supreme Court does not reconcile its expansive forfeiture rule with this consistent line of precedent.

Second, the court's forfeiture argument is based on the assumption that a defendant necessarily benefits by causing a witness to be unavailable for trial if he can use that unavailability to exclude the witness's damaging hearsay statements by asserting constitutional rights. That assumption is not true generally and certainly is not true as applied to petitioner. Had Avie survived and

petitioner been charged with attempted murder, he would have welcomed an opportunity to cross-examine her about her statements to the police. The record shows that she was a highly impeachable and unlikable witness and had a substantial history of violent and threatening conduct. RT 629, 632-636, 639-641, 734-735, 741, 922. If a party benefited from Avie's absence at trial, it was the prosecution because she was not seen by the jury and instead her testimony was given by a more presentable witness repeating the more sanitized and unalterable hearsay. As a result, petitioner had no opportunity to explore whether she embellished or provoked or fabricated the incident.

### 2. The California Supreme Court Improperly Justifies the Admission of Testimonial Hearsay in the State's Case-in-Chief on Petitioner's Proper Introduction of the Decedent's Threats to Support His Claim of Self-Defense.

The California Supreme Court's opinion improperly attempts to justify the admission of testimonial hearsay in the state's case-in-chief as an equitable response to testimony in the defense case about Avie's statements both during and prior to the incident. The court argued that because petitioner introduced Avie's threats in the defense case to support his claim of self-defense, Avie's testimonial hearsay about a prior assault by petitioner was admissible to preserve the integrity of the judicial process. *Giles, supra*, 152 P.3d at 443-444. This argument turns trial procedure and equity on their head. The state has an obligation to use only constitutionally-acceptable evidence, and that evidence must stand on its own

merits at the time it was introduced. The officer's testimony repeating Avie's statements was concededly testimonial hearsay, and as such was subject to an objection under *Crawford.*

More fundamentally, petitioner's proper introduction of evidence cannot trigger the forfeiture rule because it is not wrongdoing, let alone an intentional criminal act. Petitioner was entitled to support his claim of self-defense by introducing evidence of all the relevant circumstances, including Avie's threats at the time of the incident, her prior threats against him, and her prior threats against others of which he was aware. This evidence was relevant and admissible to prove the reasonableness of his fear and his conduct when she appeared at his home unexpectedly, threatened his life, and charged toward him. *People* v. *Spencer*, 51 Cal.App.4th 1208, 59 Cal.Rptr.2d 627, 633-635 (1996); *People* v. *Pena*, 151 Cal.App.3d 462, 474-478, 198 Cal.Rptr. 819, 824-826 (1984); *People* v. *Humphrey*, 921 P.2d 1, 6-7 (Ca. 1996). The admissibility of this evidence did not depend on her unavailability to testify, because the evidence was admissible regardless of whether or not she testified for the state. Moreover, the evidence of his prior assault on her did not contradict the evidence that she had threatened him on other occasions. The evidence of her threats was offered to show his state of mind. It is a tenuous argument at best that his use of her threats could serve as any predicate for admission of the testimonial evidence whenever offered.

The California Supreme Court's opinion exemplifies the potential misuse of the essentially equitable rationale for the forfeiture rule. The court's argument arbitrarily treats constitutional rights as benefits that can be voided because they perform their function of requiring proof in a manner that the framers of the Constitution intended. The argument that petitioner's proper use of evidence justifies the state's use of constitutionally-objectionable evidence is a conception of equity and fairness that places no limits on the introduction of testimonial hearsay in this category of cases. This view of the forfeiture rule suffers from the same defect as the reliability standard of *Ohio v. Roberts, supra,* and must be rejected for the same reason.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: August 20, 2007

Respectfully submitted,

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# OPPOSITION BRIEF

(13)

No. 07-6053 12-11-07

IN THE SUPREME COURT OF THE UNITED STATES

**DWAYNE GILES,**

*Petitioner,*

**v.**

**CALIFORNIA,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Does the "forfeiture by wrongdoing" doctrine extinguish a murder defendant's right to confront and cross-examine his victim?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-6053

**DWAYNE GILES,**

*Petitioner,*

**v.**

**CALIFORNIA,**

*Respondent.*

## STATEMENT OF THE CASE

Petitioner was charged with the murder of Brenda Avie. Prior to trial, the court considered the admissibility of evidence of a number of prior incidents between petitioner and the victim, including evidence of an incident involving petitioner's infliction of domestic violence on Ms. Avie that occurred twenty-four days before the charged murder. Immediately after that incident, Ms. Avie had made certain statements concerning it to a responding police officer that the prosecution sought to present under the California Evidence Code hearsay exception for evidence of the infliction or threat of physical injury.

As summarized by the California Supreme Court (Pet., App. A [*People v. Giles*, 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007)]), the evidence at the trial showed that petitioner had dated Brenda Avie for several years. On the night of September 29, 2002, petitioner was at his grandmother's house, socializing in the garage with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend, Tameta Munks. Petitioner's grandmother called him into the house to take a telephone call from Avie. After the call, petitioner returned to the garage and spoke to Munks, who left. (Pet., App. A at 29.)

Avie arrived at the house about fifteen minutes later and spoke with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard petitioner and Avie speaking to one another outside in a normal conversational tone. Avie then yelled "Granny" several times, and Smith heard a series of gunshots. (Pet., App. A at 29.)

Smith and petitioner's grandmother ran outside and discovered petitioner holding a nine-millimeter handgun and standing about eleven feet from Avie, who was lying

on the ground, bleeding. Petitioner's grandmother took the gun from him and called 911.

Avie had been shot six times in the torso area. Two of her wounds were fatal. One wound was consistent with her holding up her hand at the time she was shot, one was consistent with her having turned to her side when she was shot, and one was consistent with her being shot while she was lying on the ground. Avie was not carrying a weapon when she was shot. (Pet. App. A at 30.)

At petitioner's request, Smith drove him away from the house; but petitioner jumped out of her car and ran away after they had traveled several blocks. Petitioner did not turn himself in to police and was eventually arrested on October 15, 2002. (Pet. App. A at 29.)

At the close of the prosecution's case-in-chief, the prosecutor sought to call the responding officer to testify about Avie's statements describing petitioner's prior domestic violence against her pursuant to California Evidence Code sections 1109 and 1370. The trial court found that the foundational elements for the admission of the statements had been laid, and admitted the evidence.

The officer testified that when he and his partner responded to the call, petitioner answered the door, apparently agitated, and allowed them to enter. Avie was sitting on the bed, crying. The officer interviewed Avie, who said she had been talking to a female friend on the telephone when petitioner became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with petitioner, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but petitioner climbed on top of her and punched her in the face and head. After Avie broke free again, petitioner opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you." The officer saw no marks on Avie, but felt a bump on her head. (Pet., App. A at 31.)

In his defense, petitioner testified and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie was very jealous of other women, including Munks. Petitioner knew that Avie had shot a man before she met him, and he

had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions. (Pet., App. A at 30.)

According to petitioner, he had argued with Avie when she called him on the telephone on the day of the shooting. He told her that Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Petitioner told Munks to leave because he was worried about the situation, and Avie arrived soon afterwards. Petitioner told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later and told petitioner she knew Munks was returning and she was going to kill them both. Petitioner stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and petitioner, afraid she had something in her hand, fired several shots. Petitioner testified that it was dark and that his eyes were closed as he fired the gun. He claimed that he did not intend to kill her. (Pet., App. A at 30.)

Marie Banks testified that she had seen petitioner and Avie get into arguments before. Avie seemed angry on the day of the shooting, and she talked to petitioner for about half an hour until petitioner told everyone to leave. Avie and Banks left together, but as they were walking away they saw Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward petitioner's grandmother's house and Banks went home. Banks did not see the shooting. (Pet., App. A at 30-31.)

The jury found petitioner guilty of deliberate premeditated first degree murder. (Pet., App. A at 32.)

The single issue petitioner raised on appeal to the California Court of Appeal was whether the evidence was sufficient to support the jury's necessarily included finding in its first degree murder verdict that the murder was premeditated and deliberate. The Court of Appeal requested supplemental briefing from the parties on whether the evidence of Ms. Avie's statements to the officer was inadmissible as a violation of petitioner's rights under the Confrontation Clause as interpreted in this Court's then-recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court of Appeal held that the equitable doctrine of forfeiture by

wrongdoing barred petitioner from asserting his Confrontation Clause arguments because he had caused the victim's unavailability to testify at trial by his own intentional criminal conduct in shooting her to death. (Pet., App. C at 61, 65-69.)

The California Supreme Court granted petitioner's petition for review and unanimously concluded that petitioner equitably forfeited his right to confront Ms. Avie by killing her. (Pet., App. A at 29, 32-47.) The court expressly considered and rejected petitioner's argument that the equitable doctrine of forfeiture by wrongdoing was inapplicable in this case because petitioner did not kill his victim and thereby render her unavailable with the intent of preventing her testimony at a judicial proceeding. (Pet., App. A at 34.)

## REASONS WHY THE PETITION SHOULD BE DENIED

### THE CALIFORNIA SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE DOCTRINE OF FORFEITURE BY WRONGDOING WAS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND RAISES NO CONFLICT WITH OTHER LOWER COURTS

In this case, the California Supreme Court unanimously held, under the doctrine of forfeiture by wrongdoing, that a defendant who intentionally kills a witness forfeits his Sixth Amendment right to confront and cross-examine his victim. Petitioner asks this Court to hold that this was a misapplication of the doctrine because there was no separate showing that at the time he murdered Brenda Avie he intended to prevent her from testifying against him. The California Supreme Court rejected such a requirement in case of murder, the ultimate act of domestic violence and the ultimate act of rendering a witness "unavailable." At the time he murdered Ms. Avie, petitioner's intent to kill her necessarily included an intent to silence her. Petitioner knew that killing her meant that she could not testify against him.

The California Supreme Court's interpretation and application of the doctrine of forfeiture by wrongdoing was analytically sound. It was derived from and is fully

consistent with this Court's long-standing explication of the basis for the doctrine. Petitioner has not shown that there is any significant conflict in the lower courts on the question of the applicability of forfeiture by wrongdoing in a case where the victim was unavailable to testify because of her death and that death was undeniably caused by the defendant's intentional criminal act. As every court to have considered this situation since *Crawford* has recognized, forfeiture by wrongdoing must encompass the situation where a defendant's act of murder is directly and undeniably responsible for his inability to confront a witness. Forfeiture by murder is a form of forfeiture by wrongdoing that requires no additional finding of intent to silence the witness.

**A. The California Supreme Court's Interpretation And Application Of The Forfeiture By Wrongdoing Doctrine Is Supported By This Court's Precedents**

Petitioner argues that the California Supreme Court's decision is contrary to or at least inconsistent with this Court's pronouncements on the doctrine of forfeiture by wrongdoing in such cases as *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879), and *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2280 (2006). (Pet. at 19-21.) An examination of this Court's

decisions in *Reynolds*, *Crawford* and *Davis* shows that the California Supreme Court's decision applying the doctrine in the circumstances of this case is fully congruent with the principles this Court identified as the basis for the doctrine in *Reynolds* and only recently reiterated in *Crawford* and *Davis*. The opinion of the California Supreme Court includes a comprehensive examination of the development of the doctrine that demonstrates its complete and correct understanding of this Court's definition of the rule. There is no "conflict" between this Court's decisions and the decision in this case that warrants review on certiorari. *See* Sup. Ct. R. 10(c).

In arriving at its conclusion, the California Supreme Court first reviewed the historical development of the forfeiture by wrongdoing doctrine, paying careful attention to this Court's early discussion of it in *Reynolds*. The court noted that this Court had cited *Reynolds* in *Crawford* in the course of commenting that the forfeiture by wrongdoing doctrine remains a valid exception to the confrontation clause. (Pet., App. A at 34.) The California court took particular note of this Court's explanation of the reasoning underlying

the equitable doctrine of forfeiture by wrongdoing in *Reynolds*, which emphasized that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." The state court also quoted this Court's formulation of the doctrine's core foundational rationale in *Reynolds*, i.e., the equitable "maxim that no one shall be permitted to take advantage of his own wrong." (Pet., App. A at 34-35.)

Even though the facts in *Reynolds* concerned a situation involving dissuasion of a witness from testifying in a known trial, the state court recognized that, "in describing the rule," the *Reynolds* Court "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." (Pet., App. A at 35.) This perception properly supports the California court's ultimate conclusion that, in a case involving the murder of a witness, the purpose of the doctrine is to enforce one of the most basic and durable rules of equity. A murderer who seeks to use the death he caused as a shield to exclude relevant and admissible evidence has unclean hands. Equity will not permit that murderer to profit

from his own wrong. The California Supreme Court's application of the doctrine of forfeiture by wrongdoing in this case is based on this elementary principle derived from *Reynolds*. It is thus fully in accord with *Reynolds*.

The California Supreme Court found further support for its application of the forfeiture by wrongdoing doctrine in this Court's recent decision in *Davis*, which "affirmed the equitable nature of the doctrine" in the following language: "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitably grounds.' [Citations.] That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (Pet., App. A at 35-36, quoting *Davis*, 126 S. Ct. at 2280, in turn quoting *Crawford*, 541 U.S. at 62.) In the final section of its opinion in *Davis*, this Court noted that crimes involving domestic violence are more susceptible than most to the commission of wrongdoing that keeps the victim from testifying at trial and that, "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." *Davis*, 126 S. Ct. at 2279-80. While this

Court noted that constitutional guarantees cannot be vitiated simply because they may have the effect of allowing the guilty to go free, it further explained that when a defendant undermines the judicial process by procuring the absence of the victim or other declarant,

> the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: That "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, [] (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

*Id.* at p. 2280. "*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings." *Id.* This principle is also central to the holding in the present case, and shows that the California Supreme Court's analysis of

forfeiture by wrongdoing fully comports with this Court's precedents.

Continuing its analysis, the California Supreme Court also reviewed the pertinent forfeiture by wrongdoing cases in the lower federal courts decided after *Reynolds* but before *Crawford*. This group of cases, dating from the 1970's on, typically involved witness tampering situations arising in federal prosecutions of organized crime and drug conspiracies. Some of the cases involved witness tampering where the defendants murdered the witnesses. In those pre-*Crawford* cases, the federal courts applied the forfeiture by wrongdoing doctrine in situations where the defendant procured the unavailability of the hearsay declarant with the intent of making the declarant unavailable as an actual or potential witness against the defendant. The rule that applied to this category of cases, as articulated by the lower federal courts, was codified in 1997 as a statutory exception to the federal rule against hearsay. The statute requires that the party against whom a statement is offered must have engaged or acquiesced in wrongdoing that was intended to procure the unavailability of the declarant as a witness. Fed. R.

Evid. 804(b)(6). The addition of this specific intent requirement had the effect of limiting the federal hearsay exception to witness tampering cases. (Pet., App. A at 36-38.) The California Supreme Court also acknowledged a similar development of this limited forfeiture by wrongdoing rule in certain states prior to *Crawford*. In those cases, as well, the state courts generally applied the rule to situations where the defendant intended to and did tamper with an actual or potential witness to prevent the witness from cooperating with authorities or testifying. (Pet., App. A at 38, listing cases.)

After this Court's decision in *Crawford* "reshaped the confrontation landscape," however, courts dealing with questions of the applicability of the doctrine have focused more on the equitable forfeiture rationale than on the question of the defendant's intent. (Pet., App. A at 38-39.) This is especially so in cases in which the defendant kills the declarant. The California Supreme Court found that in virtually every case in which the defendant intentionally and wrongfully kills the declarant, and so is indisputably responsible for her unavailabity, the defendant has been found to have

forfeited his right to confront and cross-examine that declarant. None of these cases have required the additional showing of a specific intent to prevent future testimony. (Pet., App. A at 39-41, citing and explaining *State v. Meeks*, 88 P.3d 789 (Kan. 2004), *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005), *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), and *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004).) Indeed, the California court aptly observed that this "focus on the equitable forfeiture rationale . . . could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases." (Pet., App. A at 39.)

The California Supreme Court thus rejected petitioner's contention that, because courts have traditionally applied the forfeiture doctrine in the context of witness tampering cases and the federal rules have "codified" this approach, it would result in an improper "expansion" of the doctrine to "eliminate" an intent-to-prevent-testimony requirement. As the state supreme court noted in rejecting that argument, other courts have also explained that any intent-to-silence requirement is only mandated by the federal statutory

hearsay exception, not by the Constitution. (Pet., App. A at 41-42.) The Sixth Circuit Court of Appeals, in language approved and adopted by the California Supreme Court, explained this point:

> There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. . . . The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

(Pet., App. A at 42, quoting *Garcia-Meza*, 403 F.3d at 370-71.)

The California court also explained that petitioner's argument for an intent-to-silence requirement rests on the erroneous premise that the forfeiture by wrongdoing doctrine is not based on the broad equitable forfeiture principles discussed above, but instead on narrow principles of waiver. In support of this premise petitioner pointed to certain cases that have referred to the rule as the "waiver by wrongdoing" doctrine. In response, the California Supreme Court explained that the underlying premise of such cases, and of petitioner's argument in this regard, is that a defendant who intentionally prevents an actual or potential witness from testifying at a trial knows that the witness is no longer available and cannot be cross-examined, and thus has impliedly, if not expressly, "waived" his confrontation rights by his misconduct. (Pet., App. A at 43.) The court found this premise untenable because this Court has expressly characterized the operation of the rule as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. (Pet., App. A at 43, quoting *Crawford*, 541 U.S. at 62.) Although some courts have conflated the terms "waiver" and "forfeiture,"

this Court has stressed that they are quite different. (Pet., App. A at 45, citing *United States v. Olano*, 507 U.S. 725, 733 (1993), and *Freytag v. Commissioner*, 501 U.S. 868, 894-895, fn. 2 (1991) (conc. opn. of Scalia, J.) ("[t]he two are really not the same").

Thus, as the California Supreme Court concluded:

> Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the

witness from testifying at the time he committed the act that rendered the witness unavailable."

(Pet., App. A at 45-46.)

Based on this analysis, the California Supreme Court held that this Court's definition of the doctrine of forfeiture by wrongdoing is grounded in two venerable equitable principles: (1) "[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong"; and (2) "if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." (Pet., App. A at 44, quoting *Reynolds*, 98 U.S. at 159, 158.) In terms more specific to this case, the court held that a defendant who wrongfully causes his own inability to cross-examine by intentionally killing the witness should not be permitted to assert a violation of his right to cross-examine.

There is no question that Ms. Avie was unavailable to testify because petitioner shot her to death. If as a result of that deliberate and premeditated act petitioner were able to exclude evidence of Ms. Avie's earlier statements, the trier of fact would be deprived

of highly probative and otherwise admissible evidence bearing on the question of his guilt, thus undermining the trial's truth-seeking function, i.e., the main component of "the integrity of the criminal-trial system."

Distilled to its essence, equity is simply the concept of fairness. The California Supreme Court here correctly found that there was simply no unfairness in having petitioner bear the consequence of his intentionally wrongful act. Indeed, the application of the equitable rationale underlying the doctrine of forfeiture by wrongdoing to prevent petitioner from excluding evidence of his victim's statements to the police is particularly fair, equitable, and appropriate on this record. The California court noted that in support of his proffered defense that he shot Ms. Avie in self-defense, petitioner presented a wealth of evidence to show that Ms. Avie "was very jealous of other women, and was a violent person who had previously shot a man, threatened people with knives, and vandalized his home and car on two separate occasions." (Pet., App. A at 46.) Petitioner presented much of such evidence in the form of numerous threats and

other hearsay statements purportedly made by Ms. Avie which he employed to "portray[] her as a violent, aggressive, foulmouthed, jealous, and volatile person." (Pet., App. A at 47.) Thus, as the court reasoned, under these circumstances it was particularly fair and equitable to hold that petitioner "should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements." (Pet., App. A at 47.)

Nothing in the California Supreme Court's definition or application of the doctrine of forfeiture by wrongdoing in this case is at odds with the approach this Court has traditionally taken to the doctrine since *Reynolds*, and has recently re-affirmed in *Crawford* and *Davis*.

**B. There Is No Conflict In The Lower Courts On The Question Of Whether The Forfeiture By Wrongdoing Doctrine Applies In Cases Where The Defendant Intentionally Kills The Witness**

Petitioner asserts that, of the ten state supreme courts and one federal circuit court of appeals that have ruled on the question of whether intent to silence future testimony is an element of the forfeiture by wrongdoing

rule since this Court's decision in *Crawford*, such courts "have split on the issue six to five." (Pet. at 10.) More particularly, he asserts that, in addition to the California Supreme Court's decision in this case, the decisions of four other state supreme courts and the Sixth Circuit Court of Appeals have held that an intent to silence future testimony is not a requirement of the forfeiture rule: *State v. Mason*, 162 P.3d 396 (Wash. 2007); *State v. Jensen*, 727 N.W.2d 518 (Wis. 2007); *State v. Mechling*, 633 S.E.2d 311 (W.Va. 2006); *State v. Meeks*, 88 P.3d 789 (Kan. 2004); and *United States v. Garcia-Meza*, 403 F.3d 364. On the other hand, he asserts that five other state supreme courts have "reached the opposite conclusion," citing *State v. Romero*, 156 P.3d 694 (N.M. 2007), certiorari petition pending, No. 07-37, *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007), *People v. Moreno*, 160 P.3d 242 (Colo. 2007), *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005), and *State v. Fields*, 679 N.W.2d 341 (Minn. 2004). (Pet. at 11.) Close examination of the cases cited by petitioner shows that there is no "split" of authority, and thus no real "conflict" within the meaning of Supreme Court Rule 10(b) sufficient to warrant this Court's review on certiorari.

More precisely, there is no conflict on the crucial issue of whether a defendant who intentionally kills a declarant forfeits the Sixth Amendment right to confront and cross-examine his victim.

First, examination of four of the eleven cases cited by petitioner (two of which petitioner characterizes as in agreement with the California Supreme Court's decision in this case (*Mechling* and *Meeks*), and two of which petitioner characterizes as reaching "the opposite conclusion" (*Edwards* and *Fields*)), shows that the courts in question did not actually reach or consider any question concerning whether a defendant must intend at the time he renders the declarant unavailable that his act prevent future testimony. None of these cases can form any part of a purported "split" of authority.

In *Mechling*, the trial court admitted over the defendant's objections evidence of certain hearsay statements made by the victim of a domestic battery to others immediately after the defendant was alleged to have committed that battery on her. *State v. Mechling*, 633 S.E.2d at 314-15. On appeal, the Supreme Court of Appeals of West Virginia relied on this Court's decisions in *Crawford* and *Davis* to hold that, because the

statements at issue were "testimonial" within the meaning of *Crawford* and *Davis*, it was error for the trial court to admit them. *Id.* at 317-23. The court went on to find that because the state did not argue that the issue was harmless beyond a reasonable doubt, it had to set aside the defendant's conviction and remand the case for further proceedings. *Id.* at 323. The court in *Mechling* left it to the parties on remand to develop a record whether certain other statements by the victim were testimonial or nontestimonial. *Id.* at 324. While the *Mechling* court then went on to comment on the doctrine of forfeiture by wrongdoing and its potential application on remand in the trial court, it closed by noting that, absent a finding of forfeiture by wrongdoing on remand, the Confrontation Clause of the Sixth Amendment would operate to exclude testimony given by responding sheriff's deputies and possibly certain testimony given by an eyewitness to the alleged battery because the statements at issue were "testimonial." *Id.* at 325-26. Specifically, the court provided that, on remand, the trial court could determine whether a claim of forfeiture was properly raised and, if so, whether such a claim was meritorious. *Id.* at 326. There is, however, no

discussion in *Mechling* about whether a defendant must intend his unavailability-causing wrongful act to prevent testimony at a future trial. The court in *Mechling* simply had no occasion to consider or rule on such a question.

Similarly, an examination of the decision of the Supreme Court of Kansas in *State v. Meeks*, 88 P.3d 789, shows that no such question was addressed by that court either. In *Meeks*, the defendant shot the victim, James Green, during an argument and fistfight. About ten minutes after the shooting, Green identified the defendant as the shooter to an officer at the scene, but died soon thereafter. During trial, the prosecution introduced Green's statement identifying the defendant to the police. Although the court in *Meeks* noted that the victim's response to the officer's question might arguably be testimonial, the court found it unnecessary to decide that issue. Instead, it held that the defendant "forfeited his right to confrontation by killing the witness, Green." *Meeks*, 88 P.3d at 793-94. Noting that this Court in *Crawford* "continued to accept the [*Reynolds*] rule of forfeiture by wrongdoing which 'extinguishes confrontation claims on essentially

equitable grounds,'" the court in *Meeks* relied on the reasoning set forth in *Reynolds* that "'if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.'" *Id.* at 794. At no point in its decision, however, was the *Meeks* court ever asked to consider any question of whether, in order for the doctrine of forfeiture by wrongdoing to apply, there must be some further showing that the defendant intended to prevent testimony by the declarant/witness. Consequently, it did not.

The same is true as to the decisions in *Edwards* and *Fields*. In *Edwards*, the question before the Supreme Judicial Court of Massachusetts concerning the scope of the doctrine was not whether a defendant must be shown to have intended to prevent future testimony, but whether "collusion" with a witness to procure that witness's unavailability constitutes a sufficient "wrongdoing." *Commonwealth v. Edwards*, 830 N.E.2d at 168. The *Edwards* court found that such collusion might be sufficient, depending on the showing ultimately made on remand. *Id.* at 175. While, in stating the requirements of the rule it adopted in *Edwards*, the court included a finding that

the defendant acted with the intent to procure the witness's unavailability, *Id.* at 170, at no point in its opinion did it ever consider or discuss whether such a requirement was mandatory. There simply was no such issue raised. Rather, given the assertedly wrongful conduct at issue in *Edwards*, i.e., collusion with the witness to prevent testimony, such a requirement was simply taken as a given.

In *Fields*, the Supreme Court of Minnesota simply found, based on its review of the particular underlying record before it, which contained evidence that the defendant had made threatening calls to a witness who subsequently refused to testify at trial, that the trial court's factual findings that the defendant engaged in wrongful conduct, that the defendant intended to procure the unavailability of that witness, and that such intentional wrongful conduct actually did procure the witness's unavailability were not clearly erroneous based on that record. *State v. Fields*, 679 N.W.2d at 345-47. The *Fields* court, however, was not presented with and did not ever consider the question of whether there should be a requirement under the doctrine of forfeiture by

wrongdoing that the defendant intend his wrongdoing to prevent future testimony by the witness.

Thus, a thorough reading of *Mechling*, *Meeks*, *Edwards*, and *Fields* shows that none of those respective courts can be said to have ever considered, reached, or decided any question about whether, in order for the doctrine of forfeiture by wrongdoing to apply, the defendant must be shown to have specifically intended by his wrongdoing to prevent testimony at a future judicial proceeding. Accordingly, these cases form no part of any alleged "split" on such a question.

Most important, there is no conflict among the decisions that deal with the factual scenario presented in this case, in which the defendant is shown to have wrongfully killed the declarant/witness as the currently charged crime. On the contrary, every such case decided after this Court's decision in *Crawford* which reached the question holds that the doctrine of forfeiture by wrongdoing is applicable regardless of whether the defendant intended by his wrongdoing to prevent future testimony by the deceased declarant. Petitioner has failed to identify and respondent has not located any post-*Crawford* case in which a court declined to apply

forfeiture of the right of confrontation in a situation where the declarant/witness is intentionally killed by the defendant.

Thus, while the courts in *Romero*, *Stechly*, and *Moreno* found a an intent-to-silence requirement, none of them did so in a case involving the murder of the declarant. *Romero* concerned a situation wherein the alleged victim of the charged domestic battery made post-crime statements to a responding police officer and later to a sexual assault nurse examiner. *Romero*, 156 P.3d at 697-99. In *Stechly*, the defendant was convicted of sexual assault of the five-year-old daughter of his girlfriend based on evidence of statements made by the child-victim after and about the alleged abuse to her mother and others which were admitted after a clinical child psychologist testified that the child would likely experience trauma symptoms if she were forced to testify. *Stechly*, 870 N.E.2d at 338-41. *Moreno* similarly involved a defendant convicted of sexual assault on a child at whose trial a videotaped interview of one of child victims was played in lieu of her live testimony. *Moreno*, 160 P.3d at 243.

Indeed, in rendering its decision in *Moreno*, the Supreme Court of Colorado noted that all of the cases not requiring a showing that the defendant intended to prevent the declarant from testifying at trial, including the decision by the California Supreme Court in the instant case, involved the admissibility of prior statements made by victims of the charged homicides. *Moreno*, 160 P.3d at 245-46. It is especially significant that both the Supreme Court of Colorado in *Moreno* and the Supreme Court of Illinois in *Stechly* expressly left open the possibility that there may be a "murder exception" or "homicide exception" to their rules requiring a showing that in committing the subject wrongdoing the defendant intended to prevent the declarant from testifying at trial. *See Moreno*, 160 P.3d at 246; *Stechly*, 870 N.E.2d at 352-53. To the extent such an exception exists or might exist, it would nullify petitioner's claim of a "split" of authority.

The court in *Stechly* also suggested that those cases such as the instant one involving a defendant's killing of the declarant, "might also be reconcilable with the general rule that [an] intent [to prevent future

testimony] is required." *Stechly*, 870 N.E.2d at 352. As the *Stechly* court further elaborated in this regard,

> Notwithstanding that some cases [involving the defendant's killing of the declarant] contain broader language, the above cases have essentially held that the prosecution need not prove that the defendant committed murder with the intent of procuring the victim's absence. This is consistent with presuming such intent when the wrongdoing at issue is murder. When a defendant commits a murder, notwithstanding any protestation that he did not specifically intend to procure the victim's inability to testify at a subsequent trial, he will nonetheless be sure that this would be a result of his actions. Murder is, in this sense, different from any other wrongdoing in which a defendant could engage with respect to a witness - more than a possibility, or a substantial likelihood, a defendant knows with absolute certainty that a murder victim will not be available to testify.

*Id.* at 352-53. Thus, although the court in *Stechly* expressed no definitive opinion on the topic, it noted that, "the total certainty that a murdered witness will

be unavailable to testify could theoretically support presuming intent in the context of murder, while requiring proof of intent in all other situations." *Id.* at 353. For these reasons, the court in *Stechly* found cases like the instant one involving the murder of the declarant to be "distinguishable." *Id.*

Here, of course, it was petitioner's murder of Ms. Avie that constituted the wrongdoing in question whereby he procured her unavailability at trial. Accordingly, to the extent there is a viable "murder exception" or "homicide exception" to any requirement of an intent to prevent testimony as intimated by the courts in *Moreno* and *Stechly*, this case would fall squarely within such an exception and thus would not conflict with cases finding such an intent requirement in non-homicide situations such as *Moreno*, *Stechly*, and *Romero*.

Furthermore, to the extent that there is any "split" or conflict among the decisions pointed to by petitioner, it is a very recent one which is at this point not yet ripe for this Court's review. The decisions in *Romero*, *Stechly*, and *Moreno*, relied upon by petitioner, generally allow for or at least do not decide against a murder or homicide exception to an intent-to-

prevent-testimony rule, and were all rendered within the last eight months. Allowing further development of issues concerning the applicability or parameters of such an exception would allow the lower courts to consider such issues in the first instance and their resolution might well render any "split" as perceived by petitioner to be illusory and ultimately moot. To the extent a genuine conflict ultimately materializes, this Court will have ample opportunities to resolve it when it is actually presented.

**C. Any Error Was Harmless**

Finally, because any assumed error in admitting evidence of the victim's statements to the officer was in any event harmless, this case presents a poor vehicle for certiorari review in that the judgment will not change regardless of whether the admission of evidence of the statements was error. As this Court has previously held, violations of a defendant's right to confront witnesses as guaranteed by the Sixth Amendment are subject to harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986); *see Neder v. United States*, 527 U.S. 1, 18 (1999). Here, the record shows any error in admitting evidence of the subject statements

was harmless beyond a reasonable doubt. In this regard, as both the California Supreme Court and the Court of Appeal found, "the evidence supporting [petitioner's] [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable." (Pet., App. A at 53-54.) Thus, the verdict would have been the same even in the absence of evidence of the victim's statements and petitioner would not in any event be entitled to any relief.

## CONCLUSION

The petition for writ of certiorari should be denied.

Dated: December 11, 2007

Respectfully submitted,

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# REPLY BRIEF

(14)

No. 07-6053 12-21-07

IN THE

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

On Writ of Certiorari
to the Supreme Court of the State
of California

## REPLY BRIEF OF PETITIONER

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## I. The Lower Courts Are In Conflict On the Question Of Whether The Forfeiture Rule Requires Proof Of Intent To Prevent Testimony

Respondent contends that "there is no 'split' of authority" on the issue of intent to prevent testimony and thus no real conflict within the meaning of Supreme Court Rule 10(b) sufficient to warrant this Court's review on certiorari. (Brief in Opp. at 23.) Respondent makes two basic arguments to support this claim. The first is that four cases on which petitioner relied did not consider or rule on the intent issue. The second is that of the cases that did consider the issue, only homicide cases are relevant. Specifically, respondent argues that *State v. Romero*, 156 P.3d 694 (N.M. 2007), *petition for certiorari pending*, No. 07-37, is not relevant because it is not a homicide case, and *People v. Moreno*, 160 P.3d 242 (N.M. 2007) and *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) are not relevant because they are not homicide cases and because they left open the possibility of developing a homicide exception.

Respondent is incorrect. Many courts have acknowledged the deep split of authority on the issue of whether the forfeiture doctrine requires a showing of intent to prevent testimony. E.g., *Moreno*, 160 P.3d at 245-46; *Stechly*, 870 N.E.2d at 349, 351-52; *Romero*, 156 P.3d at 701-02; *Gonzales v. State*, 195 S.W.3d 114, 120 & n. 25 (Tex. Crim. App. 2006), cert. denied, 127 S.Ct. 564 (2006). As demonstrated below, respondent's arguments are faulty in principle, in fact, or both.

## A. The Supreme Courts Of Kansas, Massachusetts, Minnesota, And West Virginia Have Considered The Question Of Intent to Silence And Reached Conflicting Results

Respondent argues that *State v. Meeks*, 88 P.3d 789 (Kan. 2004), *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005), *State v. Fields*, 679 N.W.2d 341 (Minn. 2004), and *State v. Mechling*, 633 S.E.2d 311 (W.Va. 2006) are not part of any split of authority because they "did not actually reach or consider any question concerning whether a defendant must intend at the time he renders the declarant unavailable that his act prevent future testimony." (Brief in Opp. at 24.) Respondent is incorrect.

In *Meeks*, the Kansas Supreme Court held that the defendant forfeited his Sixth Amendment confrontation right because he caused the declarant's absence from trial by killing him. *Meeks*, 88 P.3d at 793-94. The court did not expressly address the question of whether the forfeiture rule also requires a showing that the killing was committed for the purpose of preventing testimony. However, the court must have considered the question, since it cited *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982), which required a showing of intent to prevent testimony. [1] *Meeks*, 88 P.3d at 794. Moreover, by holding that forfeiture can be

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[1] *Thevis* held: "We conclude that a defendant who causes a witness to be unavailable for trial *for the purpose of preventing that witness from testifying* also waives his right to confrontation under the *Zerbst* standard." 665 F.2d at 630, italics added. The court went on to state that "even if the government proved by clear and convincing evidence that the defendant had caused the witness' absence, the hearsay evidence would still not be admissible until the government proved the second part of the test, i.e., that the defendant-caused absence was for the pur-pose of preventing the witness from testifying. *Id.* at 633, n. 17.

established by a showing of causality alone, *Meeks* implicitly rejected an intent-to-prevent-testimony requirement.

The California Supreme Court found that *Meeks* was strong support for its own conclusion that intent to silence is not required. (Pet., App. A at 41.) Other state courts of last resort also interpret *Meeks* as not requiring intent to prevent testimony. *Stechly*, 870 N.E.2d at 274-75 (citing *Meeks* as "finding intent irrelevant" to the forfeiture doctrine); *Romero*, 156 P.3d at 701 (citing *Meeks* for the proposition that intent is not required); *Gonzales*, 195 S.W.3d at 123 (citing *Meeks* as holding that intent to silence is not required).

In *Edwards*, the Supreme Judicial Court of Massachusetts adopted a forfeiture by wrongdoing doctrine that requires a showing of intent to prevent testimony. *Edwards*, 830 N.E.2d at 168, 170. Specifically, the court held that a defendant forfeits his or her Sixth Amendment confrontation right on findings that "(1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant *acted with the intent to procure the witness's unavailability*." *Id.* at 170, italics added. The court explained that the third element relates to the defendant's intent "to ensure that the witness will not be heard at trial." *Ibid.* As to the scope of the doctrine, the court stated, "Without question, the doctrine should apply in cases where a defendant murders, threatens, or intimidates a witness in an effort to procure that witness's unavailability." *Id.* at 168-69, ns. omitted.

Other high courts recognize *Edwards* as establishing an intent-to-prevent-testimony element in the forfeiture doctrine. E.g., *Moreno*, 160 P.3d at 245 (citing *Edwards* as "finding such a requirement"); *Stechly*, 870 N.E.2d at 349 (citing *Edwards* as having "held that intent is an element of the doctrine"); *Romero*, 156 P.3d at 702 (citing *Edwards* as part of the majority that requires intent to prevent testimony).

The Supreme Court of Minnesota has also adopted a forfeiture doctrine that requires a showing of intent to prevent testimony. *Fields*, 679 N.W. at 347; *State v. Wright*, 701 N.W.2d 802, 814-15 (Minn. 2005), *vacated on other grounds*, 126 S.Ct. 2979 (2006). In *Fields*, the court held that the defendant forfeited his confrontation right because he engaged in wrongful conduct that was intended to and did procure the witness's unavailability at trial. *Fields*, 679 N.W.2d at 347. Subsequently, in *Wright*, the court reiterated the rule and the requirement of proof that the defendant "intended to procure the witness's unavailability." 701 N.W.2d at 814-15. *See also State v. Wright*, 726 N.W.2d 464, 479 (Minn. 2007) (repeating intent-to-silence requirement).

The courts widely recognize Minnesota as adopting a forfeiture doctrine that requires proof of intent to prevent testimony. E.g., *Romero*, 156 P.3d at p. 702 (citing *Wright* as requiring proof of intent to silence); *Moreno*, 160 P.3d at 245 (citing *Wright* at 726 N.W.2d at 479 as "finding" a requirement of intent to prevent testimony).

*Mechling* also issued definitive guidance on the forfeiture doctrine in the context of domestic violence prosecutions. The West Virginia Supreme Court set forth the parameters of the forfeiture rule in that state and remanded the case to the circuit court for a determination whether a claim of forfeiture was properly raised and, if so, whether it was meritorious. *Mechling*, 633 S.E.2d at 326. The court noted that forfeiture would clearly result if the defendant, after being charged, coerced the witness into not testifying. *Ibid*. The court then clearly stated that some conduct that had the unintended effect of causing the witness not to testify would also constitute forfeiture by wrongdoing. "Another likely situation where an accused may trigger forfeiture is when, after being charged, the accused engages in further abuse or intimidation of the victim *which is not explicitly intended to alter, but has the effect of altering*, the victim's testimony." *Ibid.*, italics added.

Thus, the courts in *Meeks*, *Edwards*, *Fields*, and *Wright* made a clear decision on whether intent to silence is or is not required to establish forfeiture by wrongdoing under the Sixth Amendment. This fact is widely recognized, as many courts interpret *Edwards* and *Fields* as holding that intent to prevent testimony is an element of the forfeiture rule and interpret *Meeks* as standing for the opposite proposition. *Mechling* is consistent with *Meeks* because it clearly stated that some acts that unintentionally cause a witness' absence are within the forfeiture rule. These cases represent clear and conflicting views on the question

before this Court and are properly part of the split that petitioner has noted.

### B. *Romero* Is A Homicide Case Because The Wrongdoing Was The Defendant's Killing Of The Declarant

Respondent describes *Romero* as simply a case involving post-crime statements by the alleged victim of "the charged domestic battery." (Brief in Opp. at 30.) However, the facts are more complex than this. For purposes of the forfeiture doctrine, *Romero* is a case involving the murder of the declarant.

In *Romero*, the defendant assaulted his wife in October 2001 and killed her in December 2001. He was tried and convicted for homicide first. Later, in a separate proceeding, he was tried for the assault. *Romero*, 156 P.3d at 696. Based on the homicide conviction, the state argued that the wife's testimonial hearsay was admissible to prove the assault charge because defendant forfeited his confrontation right by killing her. *Id.* at 701. The New Mexico Supreme Court held that forfeiture by misconduct requires proof that he killed her to prevent her from testifying. *Id.* at 703.

Respondent apparently seeks to distinguish petitioner's case from *Romero* on the ground that the murder in *Romero* was prosecuted in a prior proceeding. This is an artificial, meaningless distinction, which respondent does not even try to justify. For purposes of the forfeiture rule, the key facts are that in both cases (1) the defendant killed the victim, (2) there was no evidence that he did so for

the purpose of preventing the victim from testifying, and (3) the issue presented was whether the defendant forfeited his Sixth Amendment confrontation right because he killed the victim. The California Supreme Court said yes to the issue presented, and the New Mexico Supreme Court said no. They are in direct, irreconcilable conflict.

### C. Colorado Requires A Showing Of Intent To Silence In Murder Cases

In two decisions following *Moreno*, the Colorado Supreme Court required proof of intent to prevent testimony when the defendant had wrongfully killed the declarant. *Vasquez v. People*, 2007 WL 3342707 (Colo. Nov. 13, 2007); *People v. Pena*, 2007 WL 3342709 (Colo. Nov. 13, 2007).

In *Vasquez*, the defendant was convicted of murdering his wife. He was then tried for violating a restraining order and bond conditions barring contact with her. Her testimonial hearsay was admitted at that trial. *Vasquez*, 2007 WL 3342707 at *2. On appeal, the state argued that the murder was sufficient to justify the admission of testimonial hearsay in that case. The Colorado Supreme Court reaffirmed its decision in *Moreno* requiring intent to silence the witness, and stated that Colorado had joined those jurisdictions with an intent requirement. *Id.* at *3.

In *Pena*, the defendant had been convicted of the declarant's murder, and then was tried and convicted of assaulting her before the murder. As in *Vasquez*,

the Colorado Supreme Court held that there must be proof that Pena had intended to prevent the victim's testimony. *Pena*, 2007 WL 3342709 at * 2.

Thus, the Colorado Supreme Court has reaffirmed *Moreno* in the context of murder cases. Significantly, it did not consider a homicide exception when it did so. There is no concrete basis for excluding Colorado from the split of authority.

### D. The Lower Courts Are Deeply Divided Even In Homicide Cases

The lower courts are in conflict on the intent-to-silence issue even when a homicide is the basis of a claim of forfeiture by wrongdoing. Two states require proof of intent to silence: New Mexico (*Romero*) and Colorado (*Moreno, Vasquez,* and *Pena*). Five states and one federal circuit court of appeals do not: California, Kansas (*Meeks*, 88 P.3d at 793-94); Washington (*State v. Mason*, 162 P.3d 396, 403-04 (Wash. 2007)), Wisconsin (*State v. Jensen*, 727 N.W.2d 518, 536 (Wisc. 2007)); and the Sixth Circuit (*United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005)). Thus, even in this narrow class of cases, the lower courts are deeply split on whether intent to silence the witness is required to support forfeiture of the constitutional right of confrontation.

### E. The Forfeiture Rule Applies Equally To All Crimes And Wrongdoing

There is no support for respondent's attempt to treat homicide differently

from other wrongdoing under the forfeiture rule. Respondent does not cite any case where a court limited its forfeiture doctrine solely to homicides. Petitioner knows of none. The California Supreme Court certainly did not limit its forfeiture doctrine to homicides. On the contrary, it specifically stated that the doctrine applies when the declarant is "genuinely unavailable" to testify due to "any intentional criminal act" by the defendant. (Pet., App. A at 52.) Similarly, other lower courts have adopted a general forfeiture rule that applies to all crimes and wrongdoing, whether requiring or not requiring proof of intent to silence. E.g., *Edwards*, 830 N.E.2d at 170; *Fields*, 679 N.W.2d at 347. Stated another way, no court has limited the forfeiture rule to the specific crime for which the defendant was prosecuted. All cases ruling on the intent element are relevant to the split because they define the foundation for admitting testimonial hearsay under the forfeiture doctrine regardless of the crime charged.

### F. The Resolution Of The Split of Authority Should Not Be Delayed Due To The Theoretical Possibility That States Might Develop A Homicide Exception

Respondent argues that the issue presented by petitioner is not yet ripe because *Romero, Moreno, and Stechly* "generally allow for or at least do not decide against a murder or homicide exception, and all were rendered within the last eight months." (Brief in Opp. at 33-34.) These opinions, as well as *Vasquez*, are particularly important because they were decided after *Davis v. Washington*, 547

U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) and are the reasoned judgment of three state supreme courts that fully considered all the arguments for and against an intent requirement and held that intent to silence is required.

Moreover, two of the courts provide no support for a homicide exception. In *Romero,* the Supreme Court of New Mexico effectively rejected the notion by specifically requiring a showing of intent to prevent testimony when the wrongdoing is a homicide. Likewise, the Supreme Court of Colorado effectively rejected the notion by applying *Moreno's* intent-to-silence requirement to homicides in *Vasquez* and *Pena.*

The Illinois Supreme Court in *Stechly* noted a homicide exception as a "theoretical possibility." *Stechly,* 870 N.W.2d at 352-53. That did not prevent the court from adopting an intent-to-silence requirement on the authority of *Reynolds v. United States,* 98 U.S. 145 (1879) and *Davis. Stechly* at 353. The logic of *Stechly* and the other opinions requiring proof of intent to silence the witness cannot be limited to murder cases. The Confrontation Clause applies "In all criminal prosecutions." U.S. Const., Amend. VI. It is a fundamental procedural protection that is essential to the fairness of every trial. *Crawford v. Washington,* 541 U.S. 36 (2004). This Court has never indicated that Sixth Amendment pro-tections vary according to the crime charged.

In sum, respondent asks this Court to ignore the clear, concrete, growing division in the lower courts on the intent-to-silence issue in favor of a theoretical homicide exception that no court has ever adopted or seriously considered. However, it is intolerable that the constitutional right to object to testimonial hearsay depends on the state in which the crime was committed.

## II. The Error Was Not Harmless

Respondent argues that this case is a poor vehicle for certiorari review because, even if admission of the testimonial hearsay statements violated petitioner's confrontation right, the error was harmless beyond a reasonable doubt. (Brief In Opp. at 34-35.) Respondent bases his argument on one sentence in the California Supreme Court's opinion: "As noted by the Court of Appeal, 'the evidence supporting [petitioner's] [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable.' " (Brief in Opp. at 35, citing Pet., App. A at 53-54.)

Respondent takes this statement out of context. The court made the statement in the context of considering whether the evidence was sufficient to support the Court of Appeal's finding that petitioner forfeited his right to object on confrontation ground to admission of the testimonial hearsay at trial. In analyzing the issue, the court relied upon the following evidence: (1) petitioner shot the victim six times in the torso, (2) the victim was unarmed, and (3)

petitioner fled the scene after the shooting and did not turn himself in to the police. (Pet., App. A at 53.) The court then concluded:

> The above independent evidence, *considered with the victim's prior statements,* supports the Court of Appeal's conclusion that defendant did not shoot in self-defense, and instead committed an unlawful homicide that caused the victim's unavailability to testify at trial. As noted by the Court of Appeal, "the evidence supporting this [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable." Thus, defendant has forfeited his confrontation clause challenge to the victim's prior out-of-court statements to the police.

(Pet., App. A. at 53-54, italics added.)

Thus, the court simply decided that the cited evidence established the elements of California's forfeiture rule by a preponderance of the evidence. It did not consider harmless error as a possible alternate ground of decision, and neither did the Court of Appeal. The statement respondent cites does not say that the admission of the testimonial hearsay was harmless error.

Rather than being harmless error, the testimonial hearsay was critical to the prosecution's case. If, as petitioner argues, it was admitted in violation of the constitution, the error cannot be harmless beyond a reasonable doubt. The testimonial hearsay related Avie's statement that petitioner assaulted and threat-

ened to kill her. Avie made the statement about three weeks before he did kill her. It was the only evidence suggesting that he might violently attack her. It triggered a propensity instruction under California law. The instruction told the jury that if it found that petitioner committed a prior offense involving domestic violence, it may infer that he "had a disposition to commit another offense involving domestic violence" and further infer that he was "likely to commit and did commit" the charged murder. (Pet. at 3-4, 18-19.)

Respondent does not dispute the importance of the hearsay statement or that it justified the propensity instruction that was so adverse to petitioner. Nor does respondent dispute that petitioner had a substantial claim of self-defense. There were no witnesses to the shooting, and it occurred outdoors in the dark a few minutes after Avie returned unexpectedly to petitioner's home after angrily encountering his new girlfriend. Avie was a violent and jealous person. This fact was known by petitioner and was corroborated by independent witnesses. She threatened to kill petitioner and his new girlfriend and then charged toward him, prompting the shooting. (Pet. at 5-6, 18-19.) The testimonial hearsay, and the propensity instruction were critical to the jury's determination that this was a homicide rather than self-defense.

The California Supreme Court's reliance on Avie's testimonial statement to support its conclusion that the statement was properly admitted under California's forfeiture rule demonstrates its importance. Without the statement, respondent might not have proven, by a preponderance of the evidence, that

petitioner committed an intentional criminal act. Respondent has a far greater burden of proving that the testimonial hearsay, if admitted in violation of the constitution, was harmless beyond a reasonable doubt. In view of respondent's heavy burden of proving harmless error, respondent's flawed, superficial argument does not provide a basis for denying the petition for a writ of certiorari.

## CONCLUSION

For the foregoing reasons and for the reasons given in the Petition for Certiorari, this Court should issue its writ of certiorari to review the judgment and opinion of the California Supreme Court.

Dated: December 21, 2007

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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(1)

No. 07-6053

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In The

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

CALIFORNIA,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of California**

**BRIEF OF RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI**

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## INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law. Much of my academic work has dealt with the confrontation right, and since 2004 I have maintained The Confrontation Blog, http://confrontationright.blogspot.com, to report and comment on developments related to that right. In *Lilly v. Virginia*, 527 U.S. 116 (1999), I was one of the principal authors of the American Civil Liberties Union's *amicus* brief, which Justice Breyer discussed in his concurring opinion, 527 U.S. at 140-43, addressing the eventual need for re-evaluating the basis of Confrontation Clause doctrine. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I can express my own thoughts, entirely in my own voice. (Similarly, in *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007), I submitted a solo *amicus* brief, which was quoted approvingly by the court, *id.* at 951, 959.) I am entirely neutral in this

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[1] *Amicus* has given the parties more than ten days' notice of his intention to file this brief, and the parties have consented to the filing. Written statements of their consent have been filed with the Clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this brief, I support the petition for *certiorari*, brought by a criminal defendant, because I believe that this is an ideal case for the Court to begin development of the doctrine of forfeiture of the confrontation right – but my views on the merits of the question presented are far more in line with those of the respondent state.

## SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court demolished the old framework of doctrine of the Confrontation Clause and began construction of a radically different one. A central and integral component of confrontation doctrine is the principle that the accused may forfeit the confrontation right if his wrongful conduct renders the witness unavailable. Accordingly, the Court cannot build the new confrontation framework soundly without developing a carefully considered conception of forfeiture.

This case gives the Court the opportunity to begin that task. It presents one of the principal questions of forfeiture theory, one on which courts have sharply divided – whether the accused forfeits the confrontation right when his serious, intentional wrongful

conduct predictably renders the witness unavailable, even though the wrongful conduct was not motivated by the prospect of that consequence. Furthermore, it does so in the context of the most glaring form of forfeiting conduct, murder of the witness.

There are other important contexts in which this issue arises. Most notable are those of domestic violence and child abuse, in which intimidation often causes forfeiture. The ambiguities and complexities of these cases, however, make them less than ideal as initial vehicles for considering the question presented here. A better first step is to address the issue in what is the core case and in many ways the simplest, murder.

An additional reason why it is important to resolve this issue is that, to be coherent, confrontation doctrine must deal successfully with "dying declaration" cases. There is no dispute that statements fitting within the traditional hearsay exception for dying declarations are admissible, but the question is why. The traditional exception is unpersuasive on its own terms and is not at all congruent with confrontation doctrine as enunciated in *Crawford*. Careful analysis indicates that the soundest footing for admitting a dying declaration is as an instance of forfeiture theory – but that is not generally possible assuming forfeiture applies only if the accused's motivating purpose was to render the witness unavailable as a witness. A case fitting within the traditional exception is not an attractive vehicle for resolving this theoretical issue, because it will be a foregone conclusion that the statement will be admissible, and only the choice of rationale – a "dying declaration" exception to the confrontation right or instead an application of

forfeiture doctrine – will be at stake. But in a case like the present one, that choice is crucial, because the statement does not fit within the traditional exception.

## ARGUMENT

### I. THE QUESTION PRESENTED DETERMINES A CRITICAL COMPONENT OF THE ARCHITECTURE OF THE CONFRONTATION RIGHT.

#### A. The Question Presented in this Case Arises in Several Significant Contexts.

In transforming understanding of the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), left a host of unanswered questions. Many of those questions concern the fundamental question of what statements shall be deemed to be testimonial. The Court began addressing that issue in *Davis v. Washington*, 126 S.Ct. 2266 (2006). Like *Crawford*, *Davis* explicitly disclaimed any effort to provide a comprehensive definition of the term "testimonial," and it seems inevitable that the Court will find it necessary to return to this realm in the near future.[2] This case presents an altogether different issue, one that is central to the doctrine – explicitly endorsed by

[2] For example, state courts of last resort are sharply divided on the important question of whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is testimonial evidence. *See, e.g.*, Petition for Certiorari in Melendez-Diaz v. Massachusetts, No. 07-591. *Amicus* expects to move for leave to file another *amicus* brief in that case, in support of the petition.

*Crawford*, 541 U.S. at 62 – that an accused may forfeit the confrontation right by wrongdoing, and critical to the overall architecture of Confrontation Clause doctrine.

Forfeiture doctrine operates on the premise that, as in this case, the statement in question is testimonial. Therefore, assuming the accused has not had an opportunity to cross-examine the witness – that is, the person who made the testimonial statement – introducing the statement against the accused is presumptively a violation of the Confrontation Clause. But forfeiture doctrine prescribes that, by rendering a witness unavailable to testify at trial, the accused may in some circumstances lose the right with respect to statements by that witness; he cannot complain about the consequences of his own wrongful conduct. *See* James F. Flanagan, *Foreshadowing the Future of Forfeiture / Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL. 863, 867 (2007) ("The term forfeiture connotes an automatic and unintentional loss of a right upon the happening of a specified condition."); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977) ("[A] defendant can forfeit his defenses without ever having made a deliberate, informed decision to relinquish them . . . . Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind.").

It is undisputed that the accused forfeits the right when (1) the witness is unavailable to testify at trial subject to cross-examination, (2) that unavailability was caused, predictably, by wrongdoing of the accused,

and (3) the wrongdoing was motivated at least in part by a desire to render the witness unavailable. For example, forfeiture doctrine applies if the accused, for the purpose of preventing a witness from testifying against him at trial, murders her; the confrontation right presumptively will not require exclusion of a testimonial statement made by the witness, even though the accused had no opportunity to cross-examine her.[3]

The question presented by this case is whether forfeiture doctrine applies when the first and second conditions stated above, but not the third, are present – that is, when the accused engages in serious misconduct that in fact, and predictably, renders the witness unavailable to testify at trial, but there is insufficient evidence to support the conclusion that the conduct was motivated by a desire to achieve that result. The Petition ably demonstrates that the lower courts are sharply divided on this question.[4] This brief will focus on arguing that this question is a significant

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[3] This statement of the rule puts it in presumptive rather than absolute terms because the prosecution may have an obligation to provide an opportunity for confrontation if the witness survives the fatal blow for some time. *See infra* note 7.

[4] The suggestion has been made that decisions holding that there is no purpose requirement when the allegedly forfeiting conduct is murder do not necessarily conflict with decisions holding that there is such a requirement in other cases. People v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007). But even if consideration is limited to cases involving murder, the conflict is clear; at least two states apply to claims of forfeiture by murder a requirement that the prosecution prove that the murder was at least partially motivated by the desire to procure the victim's unavailability as a witness. *See, e.g.*, Pena v. People, 2007 WL 3342709 (Col. Nov. 13, 2007); Romero v. State, 156 P.3d 694, 703 (N.M. 2007), *petition for certiorari pending*, No. 07-37.

one, and that this case presents an ideal opportunity to begin the Court's consideration of it.

Most cases presenting this question fall into one of three categories:

*Category 1 (dying declarations)*: In this classic scenario, a homicide is committed, but shortly before dying, the victim, knowing that death is near, makes a testimonial statement about the fatal attack, often describing it and identifying the killer. It is virtually certain that the statement will be admitted, but determining the justification is a matter of considerable importance. The statement fits within the traditional hearsay exception for dying declarations, *see, e.g.*, Fed. R. Evid. 804(b)(2); as explained *infra* Part I.B.2, however, creating a "dying declaration" exception to the confrontation right would lack any sound rationale and would tend to undercut the foundation of the right. The persuasive justification for admitting these statements is on the basis of forfeiture – but that does not work if there is a purpose requirement for forfeiture, because usually in this setting there is no substantial proof that the killer committed the crime *for the purpose* of preventing the victim from testifying.

*Category 2 (other statements by homicide victims)*: The second category is similar to the first except that, for one reason or another, the statement does not fit within the traditional hearsay exception for dying declarations. It may be that, although the victim was near death when she made the statement, she did not realize that to be so. Or, as in this case, it may be that the testimonial statement was made before the fatal attack. In either event, if a purpose to render the witness unavailable to testify in court is a prerequisite for forfeiture doctrine, then the doctrine usually does

not apply and (assuming there has been no opportunity for cross-examination), the Confrontation Clause requires exclusion of the statement. If, however, such a purpose is not necessary for forfeiture doctrine, then the doctrine presumptively does apply and (assuming the state has not failed in a duty to mitigate the problem), the Confrontation Clause poses no obstacle to admission of the statement.

*Category 3 (intimidating conduct)*: These cases involve serious misconduct that meets two conditions: (1) the misconduct intimidates the witness from testifying at trial or subject to confrontation by the accused, and this effect is a reasonably predictable result of the misconduct; and (2) the accused did not engage in the misconduct for the purpose of intimidating the witness from testifying. Cases of domestic violence and of child abuse often fit into this category.

## B. The Question Presented in this Case Has Crucial Theoretical and Practical Consequences for Forfeiture Doctrine and for Confrontation Clause Doctrine in General.

### 1. Imposing a purpose requirement on forfeiture doctrine would tend to constrict the breadth of the confrontation right.

The doctrine of forfeiture is an essential component of the overall doctrine of the Confrontation Clause; without a robust theory of forfeiture, the Clause will likely generate unfortunate results, and in compensation courts will likely interpret the con-

frontation right more narrowly than they should. And to ensure that forfeiture doctrine is constructed sturdily, it is essential that this Court answer the question presented by the petition in this case.

In *Crawford*, the Court explicitly accepted the doctrine of forfeiture. 541 U.S. at 62. *Crawford* did not present a forfeiture issue, however, and so the Court did not go beyond noting that the doctrine "extinguishes confrontation claims on essentially equitable grounds" and that it "does not purport to be an alternative means of determining reliability." *Id.*

Nor was a forfeiture issue presented in the cases decided in *Davis*, but the matter of forfeiture loomed closely over them. Those cases involved statements alleging domestic violence, made by complainants who ultimately did not testify at trial. In arguing that these accusations were not testimonial, the respondent state in *Hammon v. Indiana* and numerous *amici* emphasized that often domestic violence complainants do not testify because of intimidation by the accused. *See* Brief of Respondent State of Indiana, *Hammon v. Indiana*, No. 05-5705, at 40 ("In domestic-violence cases, . . . it is implicitly the defendant's influence over the victim, rather than the State's, that keeps the victim from testifying."); Brief of *Amici Curiae* The National Network to End Domestic Violence, et al., in *Hammon* and *Davis v. Washington*, No. 05-5224 [hereinafter "NNEDV Brief], at 2 ("The . . . practice of 'evidence-based' prosecution ensures that violent abusers are held accountable when their own conduct makes the victim's testimony impossible to obtain."). In reply, petitioner Hammon, represented by the current *amicus*, emphasized that the proper response to this problem was not to apply an artificially narrow

construction of the term "testimonial" in the context of domestic violence. A key part of the response, rather, is a doctrine under which "if wrongful conduct of the accused causes the complainant to be unable to testify, then the accused should be held to have forfeited the confrontation right." Indeed, "a robust doctrine of forfeiture is an integral part of a sound conception of the right." Reply Brief of Petitioner Hammon, at 19-20.

The Court explicitly recognized the significance of the matter. After deciding that the accusation in *Hammon* was testimonial, it noted the argument by the states and *amici* that domestic violence "is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." The Court declared that it could not "vitiate" the constitutional right in response to this problem; rather, an appropriate remedy is the "rule of forfeiture," under which "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." 126 S.Ct. at 2279-80. The Court noted further that most courts implementing forfeiture doctrine applied the preponderance-of-the-evidence standard, and it suggested that hearsay statements, including those by the out-of-court witness the admissibility of whose statement was at issue, might be considered by the court in determining whether there had been forfeiture. Id. at 2280.

Thus, the *Hammon* Court, having just held the statement to be testimonial, made a special point of emphasizing the availability and breadth of forfeiture doctrine. This demonstrates vividly a critical tension: Absent an efficacious forfeiture doctrine, the tendency will be to constrict the confrontation right artificially by according an unduly narrow construction to the

term "testimonial." Just as brakes allow an automobile to be driven faster, the presence of a sound forfeiture doctrine allows the courts to develop the confrontation right fully to its proper extent.

**2. By preventing forfeiture doctrine from addressing the "dying declaration" case, a purpose requirement would add incoherence to, and undermine the foundations of, Confrontation Clause doctrine.**

In what is labeled above as Category 1 – "dying declaration" cases – there is little doubt about the outcome: These statements have been admitted for hundreds of years, *e.g.*, *R. v. Woodcock*, 168 E.R. 352 (K.B. 1789), and "no one would have the hardihood at this day to question their admissibility." *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). But what is the basis for taking them beyond the reach of the Confrontation Clause? There appear to be only two conceivable rationales – by incorporation of the traditional "dying declaration" exception and its rationale into the Confrontation Clause, or as an implementation of forfeiture doctrine. The first is severely flawed and would undermine the framework of the Clause. The second is persuasive, *see, e.g.*, Joshua Deahl, *Expanding Forfeiture without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 611-17 (2005) – but it cannot apply if a purpose requirement is imposed on forfeiture doctrine.[5]

[5] A court might also be tempted to hold that some dying declarations are not testimonial because they were made to private parties rather than to government officials. Such a ruling would in any event leave in the testimonial category many dying

*Crawford* recognized that a "dying declaration" exception to the hearsay rule predated the Confrontation Clause and applied to testimonial statements. Accordingly, it left open without deciding the possibility that "the Sixth Amendment incorporates an exception for testimonial dying declarations." The Court added, "If this exception must be accepted on historical grounds, it is *sui generis*." 541 U.S. at 56 n.6.

To create an exception to the confrontation right based on the traditional rationale of the "dying declaration" exception to the hearsay rule would raise two fundamental problems.

First, even on its own terms, the traditional rationale makes little sense: If statements by dying declarants were so remarkably reliable, we might have a much broader exception for all such statements, not simply those explaining the cause of death. But in fact it is absurd to say that simply because a victim is on the verge of death her statement about the cause – a statement made under great stress and perhaps on the basis of an inadequate opportunity to observe, *e.g.*, *People v. Taylor*, 737 N.W.2d 790 (Mich. Ct. App. 2007), *leave to appeal granted*, Nov. 27, 2007 (shooting from outside window while victim was in bed) – is so reliable that cross-examination would be of virtually no use.

Second, the traditional rationale does not cohere at

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declarations that fall within the traditional exception. In addition, *amicus* submits, it would be misguided: A dying person who identifies the person who has cast a fatal blow against her does so not for the amusement and edification of her audience but, in most cases, to increase the probability that her killer will be brought to justice. Also, while some dying declarations might be deemed to be made in response to ongoing emergencies under the doctrine of *Davis*, many are not. *E.g.*, *Woodcock, supra*; Williams v. State, ___ So.2d ___, 2007 WL 1774389 (Fl. June 21, 2007).

all with the fundamental theory of the Confrontation Clause as explicated in *Crawford*. The traditional rationale is that statements fitting within the exception are particularly reliable because the dying declarant will be unwilling to face the awful consequences of dying with a lie upon her lips. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 820 (1990). But *Crawford* makes crystal clear that reliability is besides the point: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69.

Now consider this alternative explanation for the "dying declaration" cases. It would be an abomination for the victim's dying statement to be excluded on the basis of the accused's inability to cross-examine her if the cause of that unavailability is that the accused murdered her.[6] Of course, the statement could properly be admitted under this application of

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[6] *See, e.g.*, United States v. Mayes, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 467 U.S. 1204 (1975) (the defendant "cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial"); State v. Bohan, 15 Kan. 407, 418 (1875) (holding that sole ground justifying "dying declaration" exception is "that the murderer, by putting the witness, and generally the sole witness, of his crime beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime"); State v. McDaniel, 8 Smedes & M. 401, 416, 1847 WL 1763 (Miss.Err. App. 1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death."); 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803) (justifying exception on the basis that "the usual witness on occasion of other felonies, namely the party injured, is gotten rid of").

forfeiture doctrine only if the trial court made a predicate finding, to the requisite degree of probability, that the accused did in fact kill the witness. But a side hearing to determine that issue does not cause a significant practical or conceptual difficulty.[7]

In short, the "dying declaration" cases can be resolved according to a theory that is sensible on its own terms and congruent with Confrontation Clause doctrine. Such a resolution requires recognition that an accused may forfeit the confrontation right even if his misconduct was not motivated by the desire to render the witness unavailable. In the long run, that recognition will strengthen the confrontation right.

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[7] The situation is very much similar to that in which a judge presiding over a conspiracy case rules that a statement is admissible under the hearsay exemption for statements of conspirators, Fed. R. Evid. 801(d)(2)(E), because it was made during the course of and in furtherance of a conspiracy of which the accused was a member – the very conspiracy being tried. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171 (1987). The fact that the judge and the jury must decide the same factual issue, for different purposes, poses no logical or practical difficulty; the judge does not announce to the jury her decision on the predicate matter. *Amicus* has made an extended argument on this point in Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 521-24 (1997).

*Amicus* believes also that inherent within forfeiture doctrine is the principle that the accused does not forfeit the confrontation right if the prosecution has and forgoes a reasonable opportunity to preserve the right, as by conducting a deposition. *Cf.* R. v. Forbes, 171 E.R. 354 (1814) (establishing right of accused to be present at deposition of dying victim). This principle produces results similar to those of the apparent-imminence requirement of the "dying declaration" exception – the circumstances in which a deposition is not reasonably practical are closely congruent with those in which the dying victim anticipates imminent death.

### 3. A purpose requirement would severely limit the usefulness of forfeiture doctrine in the context of domestic violence and child abuse

Though it offered some reflections on forfeiture doctrine, the *Davis-Hammon* decision did not directly address the question presented here: whether the accused forfeits the confrontation right if he commits serious misconduct that predictably causes a witness to be unavailable to testify at trial but that was not motivated by a purpose to cause that result. If there is such a requirement, the usefulness of forfeiture doctrine in the context of domestic violence and child abuse will be severely undercut.

Sometimes, a domestic batterer threatens his victim with harm if she testifies against him in court. Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 769 (2005). But very often a domestic batter renders his victim psychologically unable to testify without making an explicit threat, or by misconduct of which threats are a relatively small part. Frequently, the batterer's previous conduct causes the victim reasonable fear of retaliation for testimony, regardless of whether he makes an explicit threat. Deborah Tuerkheimer, Crawford's *Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Rev. 1 (2006). And trauma from the battering itself is a "pervasive aspect of battering that undermines victims' ability to testify." NNEDV Brief at 12; Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases*. 11 AM. U. J. GENDER, SOC. POL. & L. 465, 474-75 (2003).

Viewed more broadly, domestic violence is often part of a pattern of control by the batterer that creates a deeply intimidating effect. *E.g.*, LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 5 (2002) ("The overarching behavioral characteristic of the batterer is the imposition of a pattern of control over his partner.") (emphasis deleted); Tuerkheimer, *supra*, at 6-7, 10-14. In these cases, there is no substantial evidence that the unavailability of the victim was caused by misconduct in which the batterer engaged *for the purpose* of rendering the victim unable to testify.

If an absolute purpose requirement is imposed on forfeiture doctrine, therefore, in many cases of domestic violence and child abuse the Confrontation Clause will cause exclusion of the victim's statement because the accused has not had an opportunity to cross-examine her – even though the cause of that failure is that the accused's serious, intentional misconduct has, quite predictably, rendered her unavailable.

If by contrast there is no absolute purpose requirement, then forfeiture doctrine will be able to reach at least some of these cases. Whether the doctrine will actually result in admission of the evidence will depend, in the view of *amicus*, on several factors: Was the accused's misconduct serious enough to warrant forfeiture? (Perhaps as the doctrine develops, a purpose test would be decisive in cases in which the answer to this question is marginal.[8]) Is the witness genuinely unavailable? Has the state taken

[8] *Amicus* does not necessarily endorse such a principle, but it is sufficiently plausible that it should be considered.

advantage of whatever reasonable opportunities it might have had (such as conducting a deposition) to preserve the confrontation right, in while or in part, notwithstanding the accused's misconduct? Answering these questions will often be very difficult, but a doctrine along these lines would often result in admission of the victim's statement, while still giving the state incentive to do what it reasonably could to ensure that she testifies subject to confrontation, and under safe conditions. Such a rule, in short, would have very different consequences from one imposing a flat purpose requirement.

## II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

### A. This Is the Type of Case in Which the Question of Whether There is a Purpose Requirement Should First be Addressed.

What is labeled above as a Category 2 case – one that does not fit the traditional "dying declaration" exception though the allegedly forfeiting conduct is murder – is the best type of case for the Court to begin addressing the question of whether, or the extent to which, forfeiture doctrine includes a purpose requirement. In these cases, that issue is likely to determine whether or not the challenged statement is admitted. There is typically no theory other than forfeiture that will bring the statement outside the Confrontation Clause. There is no ambiguity as to whether the witness is unavailable to testify at trial. There is no doubt (assuming the predicate that the

accused killed the witness, and assuming also that the state has not failed in any mitigation requirement, see note 7 *supra*) that wrongdoing by the accused is responsible for that unavailability. There is no doubt that the misconduct alleged is sufficiently wrongful to warrant forfeiture; murder is, indeed, the paradigm of misconduct warranting forfeiture. And for similar reasons, murder presents the strongest case for declining to incorporate a purpose requirement into forfeiture doctrine; if ever forfeiture can be applied without satisfying a purpose test, it is when the misconduct alleged is murder.[9]

By contrast, a Category 1 case – one fitting within the "dying declaration" exception – would provide a poor vehicle because as a practical matter the only genuine question would be what the rationale for admission should be, as an application of either a "dying declaration" exception to the confrontation right or of forfeiture doctrine. In virtually all such cases, the outcome – admission of the statement – would be a foregone conclusion.[10]

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[9] Thus, People v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007), while adopting a purpose requirement, notes, "[S]o far as our research has discerned, every case holding intent irrelevant has involved the defendant's murdering the witness." *Stechly*'s attempt to reconcile those cases with its holding on the ground that "a defendant knows with absolute certainty that a murder victim will not be available to testify" is unpersuasive. Attempts at murder sometimes fail – and even when they ultimately succeed, the victim sometimes survives long enough to testify, at a deposition if not at trial.

[10] Forfeiture doctrine might preclude admission of a statement fitting within the "dying declaration" exception if, though the victim thought death was imminent, there was in fact an opportunity to take a deposition but the state did not take advantage of it. But a case fitting this description would be very

Category 3 cases – involving intimidating conduct – pose different types of problem. As suggested in Part I.C, even apart from the question of a purpose requirement, applicability of forfeiture doctrine in these cases tends to be very fact-bound, involving questions such as the following: Was the conduct alleged sufficiently serious, and was the intimidating effect of it sufficiently predictable, to warrant forfeiture? Was the witness in fact so intimidated that the right should be deemed forfeited? Did the state act unreasonably by failing to take sufficient advantage of opportunities to mitigate the intimidating effect of the accused's conduct? Difficult normative questions will also arise, such as: To what extent may forfeiture be based on intimidating conduct committed *before* the act being charged?

These complexities cannot be divorced from the question of the extent to which forfeiture doctrine includes a purpose requirement; as noted in Part I.C, the Court might impose that requirement in some intimidation cases but not in others, in which the question of whether the conduct is serious enough to warrant forfeiture is marginal.

In short, the Court has a choice to begin examination of the question presented from the murder end of the problem or from the intimidation end, and

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rare. Similarly, forfeiture doctrine would not apply if the court did not find as a predicate, to the requisite level of probability, that the accused killed the victim. But in most prosecutions in which dying declarations are offered, there is strong evidence, enough to satisfy whatever standard of persuasion is likely to be imposed on the prosecution with respect to the forfeiture issue, that the accused killed the victim; *Davis* suggested without deciding that the standard is likely to be preponderance of the evidence. 126 S.Ct. at 2280.

*amicus* believes that it makes more sense to begin from the murder end. Murder cases provide a simpler, less factually-sensitive context, and the one most inviting to a holding that forfeiture doctrine does not include a purpose requirement. If the Court holds (contrary to the views of *amicus*) that murder of a witness cannot result in forfeiture of the confrontation right unless the accused committed the murder for the purpose of rendering the witness unavailable, then the principle would clearly apply to intimidation cases as well. If, however, the Court holds that in the murder context there is no purpose requirement, it can then move on to the question of whether, or to what extent, the same principle should apply in the intimidation context.

### B. This Case in Particular Is an Excellent Vehicle for Considering the Question Presented.

This is a classic example of a Category 2 case, and there is no problem that undermines its usefulness as a vehicle for considering the question presented.

The decision of the California Supreme Court is a final order, and there is no doubt that this Court has jurisdiction over the case.

There is no issue of waiver; the parties have vigorously contested the question presented, and the California Supreme Court addressed it at length.

The case comes to this Court on direct review, so it is free of complications created by collateral review.

There is no material factual ambiguity. It is clear that the accused killed the victim, and the issue in the case is whether he did so in self-defense; the state has not suggested that he did so for the purpose of

rendering her unavailable as a witness.

The victim's statement was important for the prosecution; if admitting it was error, the error could not be deemed harmless.

The declarant was an adult. Statements by children raise a host of difficult factual and legal questions under the Confrontation Clause, and particularly with respect to forfeiture doctrine.[11] In the view of *amicus*, addressing a basic question of doctrine under the Clause in the context of a case involving a child witness would be unwise, because that factor could complicate and distort the question. For now, *amicus* suggests, the best use of the limited resources the Court can devote to the Confrontation Clause is to address general questions that arise in the

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[11] For example: Should the age of the declarant be taken into account in determining whether the statement is testimonial? Should some level of cognitive or moral development be considered essential to one's capacity to act as a witness for Confrontation Clause purposes? If the declarant (or a child of ordinary development of the declarant's age) understands that her statement accuses another person of wrongdoing, but does not understand the likely criminal-justice implications of the statement, is the statement testimonial, assuming it would be if made by an adult? What if the child understands that the accusation may cause the person accused to suffer adverse consequences? What procedures are necessary to determine whether a child is unable to testify? How must it be determined that the child's inability to testify is crucially caused by misconduct of the accused rather than by general trauma associated with the giving of testimony? How does the court determine that the child's apparent inability to testify was not induced by a care-giver? *Amicus* has commented on some of these issues, *e.g.*, in an entry on the Confrontation Blog, *Child Witnesses on the Academic and Judicial Front*, <http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html>.

context of both adult and child declarants; the complexities peculiar to child declarants would be better considered after the basic framework of doctrine under the Clause is more firmly established.

## CONCLUSION

The question presented by the Petition is a crucial one in determining the architecture of Confrontation Clause doctrine. This case presents an ideal vehicle for the Court to begin consideration of that question. For these reasons, the Court should grant the Petition and review the decision.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

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DWAYNE GILES,
*Petitioner,*

v.

STATE OF CALIFORNIA,
*Respondent.*

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**On Writ of Certiorari to the Supreme Court of California**

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## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether in light of *United States v. Booker*, 543 U.S. 220 (2005), Federal Rule of Criminal Procedure 32 requires a district court to provide notice to the parties before imposing a sentence outside the applicable advisory Sentencing Guidelines range based upon the considerations set forth in 18 U.S.C. § 3553(a).

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## STATEMENT OF THE CASE

### Legal Background

1. Prior to the enactment of the Sentencing Reform Act of 1984, federal district judges enjoyed nearly total discretion in matters of noncapital sentencing. *Koon v. United States*, 518 U.S. 81, 92 (1996); *Williams v. New York*, 337 U.S. 241, 246 (1949). Such broad judicial discretion—complemented by parole officers exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender. *See generally* Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9-22 (1998). Sentencing was viewed as a distinctive enterprise requiring the exercise of reasoned judgment; sentencing judges and parole officers, aided by information about offenders and largely unfettered discretionary authority, were expected to craft individualized sentences "almost like a doctor or social worker excercising clinical judgment." *United States v. Mueffelman*, 327 F.Supp.2d 79, 83 (D. Mass. 2004).

During this period, this Court stressed that procedural flexibility was essential to facilitate the sound exercise of discretionary sentencing judgment: "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams*, 337 U.S. at 247. *Accord Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13, 16 (1979) (refusing to mandate rigid procedural requirements

of sentencing ranges set forth therein. Congress also originally provided that, in order to depart from the sentencing range set forth in the Guidelines, the judge had to find "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b).

In elaborating upon judges' statutory departure authority, the Guidelines suggested that sentencing courts "treat each guideline as carving out a 'heartland' [in the form of] a set of typical cases embodying the conduct that each guideline describes," and then consider a departure only when confronted with "an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." U.S. Sentencing Guidelines Manual (U.S.S.G.) § 1A1.1, Introductory Cmt. 4(b). In other words, the Commission suggested that a sentencing court's departure decision should involve a fact-intensive inquiry to determine if a particular case involved offense conduct or offender circumstances that made the case factually atypical. *See Koon*, 518 U.S. at 95 (explaining that departure decisionmaking requires a court to examine "[w]hat features of this case, potentially, take it outside the Guidelines 'heartland' and make of it a special, or unusual, case") (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, C, J.)).

This formalized sentencing system, centered around mandatory Guidelines, necessitated more formalized sentencing procedures. The Sentencing Reform Act structured the gathering of offense facts and offender information relevant to the sentencing

judge's Guidelines calculations. Notably, the Sentencing Commission stressed in the Guidelines that "reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing." U.S.S.G. § 6A, Introductory Cmt. An entire Chapter of the Guidelines (Chapter 6) was directed toward the articulation of appropriate sentencing procedures; in this Chapter, the Sentencing Commission explained the importance of the preparation and timely disclosure of presentence reports. This Chapter of the Guidelines also urged judges to give parties "an adequate opportunity" to address matters "reasonably in dispute," and it instructed judges only to rely on factual information with "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a).

In a typical case, the Guidelines require probation officers to prepare a presentence investigative report following a guilty plea or trial conviction. These reports—which are often quite lengthy and strive to be factually comprehensive—provide the parties and the sentencing judge with information about the crime, the defendant's criminal history and other relevant facts. They also identify potential grounds to depart from the range otherwise mandated by the Guidelines.

Federal law set forth procedures for how this information was used to determine a sentence under the mandatory Guidelines. Under Federal Rule of Criminal Procedure 32, the primary rule governing procedures in federal sentencing, probation officers must provide the parties a copy of the presentence investigative report at least 35 days prior to sentencing. Fed R. Crim P. 32(e)(2). The parties then lodge objections to the report, and the probation

officer then prepares a detailed response to these objections.

While Congress contemplated a system of gathering and disseminating relevant information prior to sentencing, neither the SRA nor the Federal Rules of Criminal Procedure originally required a district judge to give the parties formal advance notice of the sentence that he was inclined to impose or whether that sentence might depart from the otherwise mandatory Guidelines range. Instead, as part of the package of reforms to Rule 32, Congress amended then-Rule 32(a)(1) to provide, in relevant part, that "[a]t the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §215, 98 Stat. 2014-15.

Soon after the start of mandatory sentencing under the Guideline system, some federal defendants challenged the unfair surprise they perceived when a district court decided, *sua sponte* and without adequate notice, to depart above the Guidelines. In *Burns v. United States*, 501 U.S. 129, 138-39 (1991), this Court issued a 5-4 decision that sought to address this concern by construing the language from Rule 32(a)(1) (currently codified at Rule 32(i)(1)(C)) to require a sentencing judge to provide the parties notice of his intent to depart from the Guidelines range where the presentence investigative report indicated that no factors warranted a departure and such factors were not apparent from the record. In 2002, this holding was codified in Rule 32(h).

In 2005, this Court's constitutional decision in *United States v. Booker*, 543 U.S. 220, resulted in another major modification of federal sentencing law and practice. In an opinion by Justice Stevens, the Court held that mandatory application of the federal sentencing Guidelines violated the Sixth Amendment of the United States Constitution because it required judges to increase sentences based on facts that had neither been found by a jury nor admitted by the defendant. *Id.* at 244. In a separate opinion by Justice Breyer ("the *Booker* remedial opinion"), the Court excised two sections from the Sentencing Reform Act—Section 3553(b) (which required sentencing courts to impose a sentence within in the Guidelines range) and Section 3742(e) (which required appellate courts to review sentences *de novo*) in order to render the Guidelines "effectively advisory." *Id.* at 245. While the Guidelines are still to be consulted and considered, district judges are now bound at sentencing only by applicable statutory ranges and the instructions set forth in Section 3553(a).

Following *Booker*, the Advisory Committee on the Federal Rules of Criminal Procedure considered a new package of amendments to the Rules. Among the proposals, discussed in greater detail *infra* at 45-46, the Advisory Committee considered amending Rule 32(h) to specify that its notice requirement also applied to so-called "variances," *i.e.* sentences imposed outside the advisory guidelines range based on the considerations set forth in 18 U.S.C. § 3553(a). Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and

Procedure (Dec. 8, 2005). That proposal, however, was never adopted.

The Standing Committee on Rules of Practice and Procedure (the body that ultimately recommends rule changes to the Judicial Conference of the United States and this Court) declined to accept this proposed change based on the reactions of various groups to the proposed rule. Standing Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States and Members of the Judicial Conference, Agenda Item E-19 at 32 (Sept. 2006). In particular, federal judges expressed "significant concern" that the proposed rule would limit judicial sentencing discretion, could often require postponement of sentencing hearings and would enhance delays in sentencing proceedings. Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 4-5. Recently, the Advisory Committee referred the matter to a subcommittee, asking it to consider, among other things, the "feasibility of providing notice, given the breadth of the statutory factors under § 3553(a) and the possibility that victims will raise new issues at the sentencing hearing." Report of the Honorable Richard C. Tallman, Chair of the Advisory Committee on Federal Rules of Criminal Procedure, to the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure at 4 (Dec. 12, 2007). Since that time, no further action has been taken.

**Factual Background**

2. On March 15, 2003, Petitioner sent the first of at least "dozens" of threatening emails to his ex-wife (who had obtained a divorce and a protective order

from Petitioner following allegations that he had abused her and their children). (JA 275). Volume 3 of the Joint Appendix reproduces these emails. Petitioner later was charged in a superseding indictment with fifteen counts of sending an electronic communication containing threats to kill or injure his ex-wife, her relatives and others in violation of 18 U.S.C. § 875(c). (JA 19-22). Each count carried a maximum term of five years imprisonment, exposing Petitioner to a potential sentence of up to 75 years of prison time.

Following his indictment, Petitioner pled guilty to one count of violating Section 875(c). Rather than enter into a formal plea agreement with the Government, Petitioner signed a "factual resume" in which he admitted to the allegations contained in Count 13 of the superseding indictment. (JA 272-76). Specifically, he admitted sending an email, the contents of which included the following passages:

> Books have you read any lately? I have one in particular on how to make bombs for who knows if I have reason to level something. I am here and think it over for when the gun is aim and the blood begins to pour it is then to late . . . Leah [the ex-wife] or whom ever are you willing to die for what you believe as i am? Well, will you give me a chance to talk or what? I promise you [the couple's children] that you will soon be with your true Irizarry family and possibly Elaine [the ex-wife's mother]. I see the future i have wanted to avoid now but this is the only way. No parents is what you children will have . . . Leah i hope you have a better plan for i am coming and you will answer. You and Kim [her new husband] crying

> before me and we will see which of you chooses who over the other when I take aim! (JA 273-74)

In the resume, Petitioner also admitted that he intended this email to be a "true threat to kill or injure the person" of Petitioner's ex-wife and her new husband, and that he had sent "dozens of other similar emails . . . for a prolonged period of time . . . [and] acted knowingly and willfully." (JA 274-75).

Following submission of the guilty plea, the parties and the probation officer prepared for sentencing pursuant to a standing order issued by the Chief Judge of the district court (who also happened to be the sentencing judge in this case). (JA 278-84). The probation officer first prepared a thorough and detailed pre-sentence report ("PSR"). The PSR noted the maximum prison term for the offense to which Petitioner pled guilty (5 years). (JA 404 ¶3). The PSR also indicated that, after Petitioner had pled guilty to the offense, he allegedly approached a cellmate about killing his ex-wife's new husband. (JA 405 ¶11). The report calculated a total offense level of 22, reflecting a base offense level of 12 plus three enhancements based on offense-related conduct. (JA 407). The PSR further explained why, even though Petitioner had several prior convictions for crimes including violation of the protective order for his ex-wife, Petitioner was to be placed in criminal history category of I, the lowest possible under the Guidelines. (JA 408-10). Synthesizing these facts and Guideline data points, the PSR calculated an advisory guidelines range of 41-51 months. (JA 415). The final paragraph of the PSR indicated that the sentencing court might consider an upward departure from the applicable guidelines range on the ground that criminal history category I—the category

applicable to true first offenders—did not "adequately reflect[] [Petitioner's] past criminal conduct, or the likelihood that [Petitioner] will commit other crimes." (JA 417 ¶ 78). Consistent with the standing order, the probation officer prepared this report approximately two months before the scheduled sentencing hearing. (JA 417).

The parties then prepared their responses to the PSR. In a pleading filed over one month before the sentencing hearing, the Government stated that it had no objections to the presentence report and also disclosed that it intended to call Petitioner's ex-wife at the sentencing hearing. (JA 293-94). Petitioner's counsel raised two material objections to the report—he objected to the six-level enhancement in the base offense level for the probation officer's factual finding that Petitioner intended to carry out his threat; he also objected, in passing, to the probation officer's refusal to recommend a reduction in the base offense level for acceptance of responsibility. (JA 295-96). Petitioner's counsel did not indicate that he intended to call any witnesses at the sentencing hearing. Consistent with the standing order, Petitioner's pleading was filed ten days before the sentencing hearing. (JA 297). Three days later, on March 10, the probation officer filed a revised presentence report which included an addendum responding to Petitioner's counsel's objections. (JA 297).

3. The sentencing hearing took place on March 17, 2005 (approximately two months after this Court decided *Booker*).

The Government first called Petitioner's ex-wife, whose testimony it had previously disclosed over a month earlier in its response to the presentence report. Petitioner's ex-wife testified pursuant to the

Crime Victims' Rights Act, a law enacted by Congress in 2004 that, among other things, guarantees a crime victim the right to be present and heard at any hearing affecting the defendant, including a sentencing hearing, 18 U.S.C. § 3771. During her testimony, Petitioner's ex-wife explained how Petitioner had "terrorized" her and her family and wanted to be sure that the court understood what had happened "and what could happen." (JA 304). She confirmed that both she and her son had suffered physical abuse at Petitioner's hand (JA 306-07). She explained that she had been suffering from posttraumatic stress disorder, that she had moved to Alabama because Petitioner had located her in South Carolina (in violation of the restraining order) and that she and her relatives were presently concerned for her (and her son's) safety. (JA 311-14). She also indicated that Petitioner had called her and had sent her a Christmas card postmarked from Mobile, Alabama (the city where she lived, whereas Petitioner lived in California). (JA 315-18). Though given the opportunity, Petitioner's counsel did not cross examine Petitioner's ex-wife. (JA 322).

Two other witnesses also testified for the Government, Michael Eubanks (a special agent with the FBI) and Jack Garris (Petitioner's former cellmate). Though the Government had not disclosed these witnesses in its response to the presentence report, Petitioner's counsel did not object to their testimony at the sentencing hearing. Among other things, Agent Eubanks testified about certain items found in Petitioner's automobile at the time he was taken into custody. Specifically, law enforcement officers found maps of Mobile, Alabama "with various notes circled regarding possible whereabouts of [Petitioner's ex wife], her children's schools and the workplace of her

current husband." (JA 327). He also testified about an interview of Petitioner during which Petitioner indicated that he would kill people for his kids, that he would "take a machete and whack their heads off," and that he would "leave a trail of blood from here to Alabama" in order to protect his children. (JA 329-30). Mr. Garris testified that, while he was Petitioner's cellmate, Petitioner was obsessed with the idea of killing his ex-wife's new husband and his ex-wife's mother. (JA 333-39). Petitioner's counsel cross-examined both of these witnesses. (JA 330-32, 339-445).

Petitioner's counsel then was given an opportunity to present evidence. After being noncommittal at the start of the hearing whether he would put on any evidence, (JA 302), defense counsel decided to call Petitioner as his only witness. (JA 347). Petitioner testified that he accepted responsibility for his conduct, that he did not intend to harm his wife, that the information found in his automobile had an innocent explanation, and that various allegations about his violent proclivities were lies. (JA 348-51).

After these presentations, both counsel were given the opportunity to argue about the significance of the testimony presented at the hearing. Petitioner's counsel urged the Court to consider Petitoner's mental condition, including a mental health report prepared about Petitioner. (JA 365, 368). While conceding that Petitioner threatened his ex-wife and that she perceived Petitioner's emails as threats, Petitioner's counsel argued that the six-level enhancement to the base offense level was unjustified because Petitioner lacked the necessary intent to carry out the threats. (JA 366). He also urged the Court to reduce the base offense level in light of

Petitioner's acceptance of responsibility and tried to downplay the significance of the testimony from Petitioner's cellmate. (JA 366-67). Petitioner's counsel did not directly address the testimony from Petitioner's ex-wife or Agent Eubanks. During this presentation, Petitioner's counsel appeared to acknowledge that the Guidelines operated only "in an advisory capacity." (JA 367). Following this presentation, the prosecutor briefly responded. (JA 367-68).

The sentencing judge, Chief Judge Callie V.S. Granade, then ruled on the parties' disagreements over the presentencing report. In both respects, she rejected Petitioner's contentions. Chief Judge Granade found that the six-level enhancement to the base-offense level was appropriate and that Petitioner did not qualify for a reduction based on acceptance of responsibility. (JA 370-72).

Reminding Petitioner's counsel that the Guidelines were now advisory—a fact that Petitioner's counsel again acknowledged—Chief Judge Granade asked whether counsel had anything further to say. (JA 372-73) Counsel declined but Petitioner, with the trial judge's approval, briefly spoke on his own behalf.

Chief Judge Granade then announced the sentence and explained her reasoning:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find [Petitioner's] conduct most disturbing. I am

> sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guidelines range, I think, is not high enough. (JA 374-75)

She sentenced Petitioner to sixty months imprisonment, nine months higher than the term recommended by the Guidelines (taking into account the enhancements) and the maximum period for the single count to which Petitioner pled guilty (out of the fifteen counts originally charged). (JA 375). She recommended that the Bureau of Prisons place Petitioner "at an institution where mental health treatment is available." (JA 383). She also sentenced him to three years of supervised release, including participation "in a program of mental health treatment and/or counseling." (JA 384).

Following imposition of this sentence, Petitioner's counsel objected on the ground that the sentence "constitute[d] an upward departure . . . [and that Petitioner] didn't have notice of [the judge's] intent to upwardly depart." (JA 377). Chief Judge Granade rejected these objections, noting that Petitioner's counsel "had notice that the guidelines were only advisory and that the court could sentence anywhere within the statutory range as defined by the United States Code." (JA 377). The court then dismissed the fourteen other counts against Petitioner. (JA 378).

4. The United States Court of Appeals for the Eleventh Circuit unanimously affirmed the judgment. (JA 392-400). Taking the position adopted (or eventually adopted) by five other federal courts of

appeals, the Eleventh Circuit held that Federal Rule of Criminal Procedure 32(h) did not require a district court to provide notice to a defendant prior to imposing a sentence outside the range recommended by the advisory Guidelines based on the considerations set forth in Section 3553(a). The Eleventh Circuit's ruling was based on two main rationales.

First, the appellate court concluded that Chief Judge Granade imposed a variance from the advisory Guidelines range, not a departure, because she had based the sentence principally on the considerations set forth in Section 3553(a) (rather than atypical facts that might justify a traditional departure under the Guidelines). Since Rule 32(h) explicitly speaks only in terms of departures (not variances), continued the Eleventh Circuit, the district judge's sentencing decision did not trigger its extra procedural requirements.

Second, the appellate court noted that, in the wake of this Court's decision in *Booker*, "parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum." (JA 399-400). As explained by the Eleventh Circuit, *Booker* eliminated the concerns of "unfair surprise or inability to present informed comment" that animated this Court's earlier decision in *Burns*, rendered at a time when application of the Guidelines was mandatory. (JA 400).

Petitioner filed a timely petition for a writ of *certiorari*, which this Court granted on January 4, 2008. (JA 401).

## SUMMARY OF THE ARGUMENT

Federal Rule of Criminal Procedure 32 does not require a district court to provide notice prior to imposing a sentence outside the range recommended by the advisory Guidelines based on the factors set forth in 18 U.S.C. § 3553(a). Neither provision of Rule 32 relied upon by Petitioner—Rule 32(h) or Rule 32(i)(1)(C)—supports a notice requirement in this context.

Petitioner's reading of Rule 32(h) cannot be squared with the rule's plain language, with speaks repeatedly and exclusively in terms of departures. Departures and variances are fundamentally different sentencing devices: departures depend on facts not adequately taken into account by the Sentencing Commission; variances depend on reasoned judgments based on the considerations set forth in Section 3553(a) by Congress. In light of the fundamental distinction between a departure and a variance, the notice rule for departures has never been, and should not now be, extended to variances.

Rule 32(i)(1)(C) should not be interpreted to require notice prior to the imposition of a variance. By its plain terms, the rule does not require notice at all. While this Court in *Burns* interpreted the rule to require notice for departures, this Court's decision in *Booker* changed the legal landscape of federal sentencing. A notice rule would impose a significant burden on trial judges. It would prompt judges to gravitate back to the guidelines range in contravention of *Booker* and its progeny.

Regardless of the textual hook, Petitioner's proposed rule would circumvent and undermine the carefully designed process for amendments to the

federal procedural rules. Tellingly, that process considered and rejected the very rule Petitioner seeks. A critical reason for that rejection was the strenuous objection by federal judges on many of the grounds that *amicus* identifies here.

The canon of constitutional doubt does not support Petitioner's rule. Neither provision of Rule 32 is sufficiently ambiguous to support the canon's application. Even if they were, the Due Process Clause does not entitle a criminal defendant to notice prior to the imposition of a variance. Historically, criminal defendants were not legally entitled to special notice prior to the district court's imposition of a sentence. Even if history is not dispositive, the balancing test sometimes used in this Court's procedural due process jurisprudence does not support Petitioner's rule.

## ARGUMENT

### I. FEDERAL RULE OF CRIMINAL PROCEDURE 32, AS PRESENTLY DRAFTED, DOES NOT REQUIRE A DISTRICT COURT TO PROVIDE NOTICE OF ITS INTENT TO IMPOSE A SENTENCE OUTSIDE THE RANGE RECOMMENDED BY THE ADVISORY GUIDELINES WHEN BASED ON THE CONSIDERATIONS SET FORTH IN 18 U.S.C. § 3553(A).

This is a case about interpretation, so the relevant text provides the proper starting point for the analysis. *See e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Critically, no provision of the United States Code or the Federal Rules of Criminal Procedure expressly or even implicitly requires a federal district judge, whenever she ultimately concludes that Section 3553(a) demands a

sentence outside the range recommended by the advisory Guidelines, to provide notice to the parties of any and all reasons she believes a variance may be appropriate.[1]

Just as "Congress has shown that it knows how to direct sentencing practices in express terms," *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007), so too has it shown that it knows how to direct sentencing procedures, including notice requirements as to the terms of punishment, *see, e.g.*, 18 U.S.C. §§ 3552(d), 3553(d), 3664. Tellingly, more than three years after *Booker*, Congress has not enacted the kind of notice requirement that Petitioner urges here, and the Standing Committee on Rules of Practice and Procedure has to date declined to recommend such a notice requirement to this Court. *See* Standing Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States and Members of the Judicial Conference, Agenda Item E-19 at 32 (Sept. 2006).

Finding no support for his claims in the text of the United States Code or the Federal Rules, Petitioner suggests (Brief at 19-20) that the reasoning behind

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[1] *Amicus* reluctantly uses the term "variance" to describe a non-Guideline sentence justified on the basis of considerations set forth in Section 3553(a) so that the briefs use a consistent vernacular. While "variance" offers a convenient shorthand, the term inappropriately suggests that sentences recommended by the advisory Guidelines should be a normative baseline from which other sentences are said to "vary." However, as this Court has made abundantly clear in recent rulings, though a district judge must consult the Guidelines, she may *not* view any sentence recommended by the advisory Guidelines as presumptively appropriate or reasonable. *See Rita v. United States*, 127 S.Ct. 2456, 2465 (2007); *Gall v. United States*, 128 S.Ct. 586, 595 (2007).

this Court's pre-*Booker* decision in *Burns* supports reading a notice requirement into one of two rules—Rule 32(h) or Rule 32(i)(1)(C). But neither rule should be read to extend or expand a formal notice requirement limiting the authority of district judges to impose sentences outside the Guidelines pursuant to Section 3553(a) considerations. Petitioner's proposed extension of the current sentencing rules would circumvent the typical rulemaking process which, critically, has so far resisted a formal change along the lines urged by Petitioner (due, in part, to the concerns strongly expressed by federal judges who recognize the legal and practical problems it would create). Nor does the canon of constitutional doubt require rewriting the current rules as Petitioner urges.

### A. Rule 32(h) Does Not Require Notice That A Court Is Contemplating A Section 3553(a) Sentence Outside The Advisory Guidelines Because Such A Sentence Is Not A "Departure."

Federal Rule of Criminal Procedure 32(h) provides:

> Before the court may *depart* from the applicable sentencing range on a ground not identified for *departure* either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a *departure*. The notice must specify any ground on which the court is contemplating a *departure*. (emphases added)

As the highlighted language indicates, the rule speaks repeatedly—and exclusively—in terms of "departures." Departure, contrary to Petitioner's suggestion (Brief at 28), is "a term with a precise

legal meaning." *United States v. Vega-Santiago*, No. 06-1558, 2008 WL 451813 at *1 (1st Cir. Feb. 21, 2008) (*en banc*). Before *Booker* excised parts of the SRA to make the Guidelines "effectively advisory," district judges were only allowed to depart from the mandatory Guidelines after finding "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also Burns*, 501 U.S. at 133 (noting that Section 3553(b) is "[t]he only circumstance in which the district court can disregard the mechanical dictates of the Guidelines"). Implementing this statutory limitation on departure authority, the Sentencing Commission instructed federal courts to "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. § 1A1.1(b). The Commission's Guidelines also specified prohibited departure factors (such as a defendant's race, U.S.S.G. § 5K2.0(d)(1)), discouraged departure factors (such as a defendant's family ties, U.S.S.G. § 5H1.6), and encouraged departure factors (such as disruption of a government function, U.S.S.G. § 5K2.7). *See Koon*, 518 U.S. at 95-96.

As this Court emphasized in *Booker*, "departures are *not* available in every case, and in fact are unavailable in most." 543 U.S. at 234 (emphasis added). This is because, in all mine-run cases with typical offense facts and offender circumstances, "as a matter of law, the Commission will have adequately

taken all relevant factors into account, and no departure will be legally permissible [and thus] the judge is bound to impose a sentence within the Guidelines range." *Id.* at 235. Indeed, as this Court stressed in *Booker*, this critical legal reality prevented traditional departure authority from salvaging the constitutionality of a mandatory guideline system built around judicial fact-finding.

*Booker*, of course, changed both the scope of district court discretion and the terms of the sentencing debate. The term "variance" has generally been adopted to describe the exercise of the new form of discretion created by the *Booker* remedial opinion. This term also has "a precise legal meaning" quite different from "departure." A variance is a sentence set outside the range recommended by the advisory guidelines (after considering any departures encouraged or discouraged by the Guidelines), and it is a sentence that reflects the considerations Congress set forth in Section 3553(a).

As recent rulings clarify, a district judge still should start the sentencing process by accurately calculating the applicable Guidelines range (including any traditional departure considerations). *See Kimbrough*, 128 S. Ct. at 570; *Gall v. United States*, 128 S. Ct. 586, 596 (2007); *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). But unlike the pre-*Booker* sentencing world, Guideline-centered adjustments and departure calculations do not end the sentencing inquiry. After completing the fact-finding and basic math required to determine an applicable Guideline range, the district judge must then exercise her independent "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors," *Rita*, 127 S. Ct. at

2469—factors such as "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct," "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(2)(B) & (a)(6)-(7). In doing so, a district judge may not treat the sentencing range recommended by the advisory Guidelines as presumptively reasonable, *Rita*, 127 S. Ct. at 2465, and the judge must set forth "a statement of reasons . . . [sufficient] to satisfy the appellate court that [the judge] has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita*, 127 S. Ct. at 2468. When conducting appellate review, circuit courts must apply "a deferential abuse-of-discretion standard" and may not treat an outside-the-Guidelines sentence as presumptively unreasonable. *Gall*, 128 S. Ct. at 591.

The distinction between "departure" and "variance" is critical to a proper resolution of this case. Departures are justified on the basis of distinct facts that may make a case atypical; variances are justified on the basis of reasoned judgments *about* facts in light of the statutory commands Congress set forth in Section 3553(a). *See Gall*, 128 S. Ct. at 597. Both the text of the SRA and this Court's constitutional jurisprudence reinforce this important distinction between fact-based departures and judgment-oriented variances.[2] *See generally* Douglas A. Berman,

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[2] *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490-91 (2000) (stressing that facts (other than prior conviction) that increase an applicable statutory maximum must be proved to a jury beyond a reasonable doubt but that judicial fact-finding implicit

*Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006). Governing sentencing statutes—which now mandate that judges consider the needs of deterrence, incapacitation, retribution and rehabilitation, while also seeking to avoid unwarranted disparities, all in the course of imposing a sentence that is "sufficient, but not greater than necessary"—require federal sentencing judges to exercise reasoned judgment guided by the provisions of Section 3553(a) after they have calculated a Guidelines range through Guideline-structured fact-finding. This was most recently confirmed in *Kimbrough*, where this Court upheld a district judge's sentencing determination, even where his reasoned policy judgment contravened the express terms of the Guidelines. 128 S. Ct. at 564.

As highlighted above, departure authority was once subject to a statutory precondition requiring a judicial finding that the Sentencing Commission has not adequately taken some factor into consideration in formulating the applicable guideline, 18 U.S.C.

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in discretionary sentencing regimes presents no constitutional problems); *Blakely v. Washington*, 542 U.S. 296, 303, 313 (2004) (reiterating the constitutionality of an "indeterminate-sentencing regime that allow[s] a judge (but did not compel him) to rely on facts outside the trial record" and then clarifying that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"); *Cunningham v. California*, 127 S. Ct. 856, 868 (2007) (describing how aggravating circumstances authorizing enhanced sentences under California law present Sixth Amendment problems because they "depend on facts found discretely and solely by the judge"), *Booker*, 543 U.S. at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

§ 3553(b), and departures are still governed by Guideline provisions that may forbid, discourage or encourage adjustments to the otherwise applicable Guideline range because of a case's atypical facts. By contrast, variances are subject to a higher authority—the still mandatory provisions of Section 3553(a)—and they do not require any sort of anterior finding. Indeed, this Court's instructions in *Gall* and *Rita* that district courts may not treat the advisory Guidelines range as presumptively reasonable indicate that sentencing determinations pursuant to Section 3553(a) cannot and should not be completely subservient to the advice in the Guidelines. *See Gall*, 128 S. Ct. at 595; *Rita*, 127 S. Ct. at 2465.

In short, departures still serve as the means for sentencing courts to give sensible consideration to factually atypical cases, "within the Guidelines framework," while variances serve as the means for sentencing court to implement the (now constitutionally essential) requirement to exercise reasoned judgment at sentencing. *Rita*, 127 S. Ct. at 2461. Thus, variances and departures are "distinct sentencing mechanism[s]," and Federal Rule of Criminal Procedure 32(h)—which speaks solely in terms of "departures"—simply cannot be stretched to require notice for the type of sentence that the district judge imposed in this case. *United States v. Atencio*, 476 F.3d 1099, 1109 (10th Cir. 2007) (Murphy, J., dissenting from denial of rehearing *en banc*).

Petitioner's rejection of this analysis rests on the premise that any different rules for departures and variances would "create an artificial distinction." (Brief at 22). That premise is incorrect. Presentencing notice in the context of traditional departures is justified and administratively feasible

because a presentence report and/or the district court should and sensibly can alert the parties to whatever distinctive case *facts* may seem atypical. Then the parties can assess these noticed facts and can contest their accuracy and atypicality. Moreover, as this Court emphasized in *Booker*, traditional "departures are *not* available in every case, and in fact are unavailable in most." 543 U.S. at 234 (emphasis added).

In sharp contrast, the considerations set forth in Section 3553(a) that can justify a variance apply in every case; notice of potential variance considerations is provided in all cases to all parties directly through the provisions of Section 3553(a), the presentence report and the parties' responses thereto. The parties can and should come to a sentencing hearing fully aware that the sentencing court must give reasoned (and Guideline-independent) consideration to the sentencing objectives and considerations set forth by Congress in the statutory text of the Sentencing Reform Act.

Treating variances and departures differently does not create an "artificial distinction." Rather it gives real meaning and import to this Court's recent constitutional jurisprudence, to the *Booker* remedy, and to the still-mandatory provisions of the Sentencing Reform Act. This Court should reinforce the critical conceptual distinction between variances and departures and, consequently, decline to apply Rule 323(h) to variances.

### B. Rule 32(i)(1)(C) Should Not Be Extended To Require Notice Prior To Imposing A Section 3553(a) Sentence Outside The Range Recommended By The Advisory Guidelines.

Rule 32(i)(1)(C) provides in relevant part that, "[a]t sentencing, the court . . . . must allow the parties' attorneys to comment on . . . other matters relating to an appropriate sentence." By its plain terms, this Rule does not require a district judge to provide the parties with any formal pre-hearing advanced notice at all. *See Burns*, 501 U.S. at 141 (Souter, J., dissenting). Nonetheless, the Court in *Burns*, recognizing it confronted an "extraordinary case in which the district court, on its own initiative and contrary to the expectations of both the defendant and the Government, decide[d] that the factual and legal predicates for a departure [were] satisfied," 501 U.S. at 135, concluded that "Congress, in enacting the Sentencing Reform Act, intended that" a district judge provide some form of advance notice before departing *sua sponte* from the recommended Guidelines range. *Id.* Writing for the Court and making much of congressional intent surrounding the passage of the Sentencing Reform Act, Justice Marshall emphasized "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to *fixing Guidelines sentences*." *Burns*, 501 U.S. at 137 (emphasis added).

Petitioner urges (Brief at 20) that the reasons underpinning *Burns* justify extending Rule 32(i)(1)(C) to variances. For several reasons, Petitioner's proposed extension of *Burns* is ill-advised.

### 1. After *Booker*, the parties have to understand and expect that district judges must take into consideration all the Section 3553(a) factors and not just the Guidelines.

This Court's decision in *Burns*, written at a time when the Guidelines were mandatory, focused on an "extraordinary case" in which the parties clearly had come to the sentencing hearing expecting a Guideline sentence to be imposed because neither the pre-sentence report nor the parties had suggested any grounds for a departure. Within the pre-*Booker* mandatory Guideline system, if a presentence report and the parties had concluded that a case was factually typical and required a within-Guideline sentence, a sentencing judge's unexpected conclusion that the case was factually atypical and merited a departure would disrupt the settled sentencing expectations that had prevailed throughout the entire pre-sentencing process. In other words, within a mandatory Guideline system in which departures were "unavailable in most" cases, *Booker*, 543 U.S. at 234, concerns about unjust surprise from *sua sponte* departures were well-founded. Against this backdrop, the *Burns* decision, relying heavily on congressional intent, interpreted the criminal rules to require judges to give the parties some advance notice of what factors, in the judge's view, made the case at hand atypical.

As a result of the *Booker* remedial opinion, the legal regime and the parties' settled sentencing expectations are now significantly different. Even in a completely typical case, a district court may not presume that a sentence within the advisory Guidelines range is appropriate. Rather, as this

Court repeatedly and recently has stressed, a district judge must hear the parties arguments for whatever sentence they believe appropriate and then independently "exercis[e] his own legal decisionmaking authority" according to the statutory instructions set forth by Congress in Section 3553(a). *Rita*, 127 S. Ct. at 2468; *see also Gall*, 128 S. Ct. at 596-97. Consequently, the parties now have to understand and expect that district judges are obliged to take into consideration all the Section 3553(a) factors along with the Guidelines; the entire post-*Booker* legal structure provides the parties with notice that district courts are now principally tasked with imposing a sentence "sufficient, but not greater than necessary" to achieve congressional sentencing purposes.

**2. Extending *Burns* to variances would erect a burdensome and problematic procedural impediment to the district court's exercise of the discretion deemed constitutionally essential by *Booker* and its progeny.**

This Court's recent federal sentencing decisions have (1) emphasized the added sentencing discretion district judges must have now that the Guidelines are "effectively advisory," and (2) clarified that judges are authorized to sentence outside the range recommended by the advisory Guidelines on the basis of the judgment-oriented factors set forth in Section 3553(a). *See Kimbrough*, 128 S. Ct. at 564; *Gall*, 128 S. Ct. at 596-97. To preserve the exercise of this discretion and to avoid the constitutional problems that could arise if the Guidelines were to lose their advisory status, this Court has frowned upon judicially created procedural requirements that would

unduly encourage district courts to sentence within the range recommended by the advisory Guidelines. *See Gall*, 128 S. Ct. at 595. This Court's decisions in *Rita* and *Gall* are particularly instructive on this point. *Rita* made clear that district courts may not treat the range recommended by the advisory Guidelines as presumptively reasonable. 127 S. Ct. at 2465. *Gall* made clear that circuit courts may not treat sentences outside the advisory Guidelines range as presumptively unreasonable. 128 S. Ct. at 595. These holdings made eminent sense in light of *Booker*, for contrary rules could have given more weight to the Guidelines than *Booker* allows.

The rule urged by Petitioner seeks through enhanced procedural requirements again to endow the Guidelines with heightened legal significance—which risks creating an excessive "gravitational pull" back toward the Guidelines, *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting), and placing an inappropriate "thumb on the scales," *Kimbrough*, 128 S. Ct. at 577 (Scalia, J., concurring). Though the judicial creation of a procedural requirement for sentencing outside the Guidelines differs formally from presumptions in favor of the Guidelines, they can both problematically burden a district judge's exercise of the added discretion resulting from the *Booker* remedial opinion. Under Petitioner's notice rule, imposition of a within-Guidelines sentence spares the judge any obligation to provide notice in advance of the sentencing hearing. By contrast, a sentence outside that range, though expressly contemplated by *Booker* and subject already to a general requirement that judges provide a fuller account of the reasons for the sentence, carries potentially much higher practical costs for the judge.

District judges are very busy, and sentencing caseloads in some jurisdictions can be staggering. In 2006, approximately 474 total cases per authorized district judgeship were pending in the federal district courts. *See* Administrative Office of the United States Courts, 2006 Judicial Facts and Figures Table 6.1, *available at* http://www.uscourts.gov/judicialfactsfigures/2006/Table601.pdf (last visited Mar. 19, 2008); *see also* 2007 Year-End Report on the Federal Judiciary 10, 12 (Jan. 2008) (noting that over 250,000 cases, including 68,413 criminal cases, were filed in the federal district courts in 2007). On average, a district judge sentences slightly more than two criminal defendants per week and just under ten per month, *see Gall*, 128 S. Ct. at 598 n.7 (citing Administrative Office of the United States Courts, 2006 Federal Court Management Statistics 167); in busier districts, judges are sometimes required to sentence dozens of defendants in a typical week. *See Immigration Crisis Tests Federal Courts on Southwest Border*, The Third Branch: Newsletter of the Federal Courts, June 2006 (noting that judges in border districts carry huge felony caseloads and quoting a judge who "has sentenced 50 [defendants] in a week").

While managing these large caseloads, district judges will often receive a complete package of sentencing materials only days before the sentencing hearing. In this case, for example, Chief Judge Granade had a complete packet of sentencing papers only seven days before the sentencing hearing. (JA 419). Realistically, busy district judges can be expected to review the parties' sentencing filings only days before, sometimes perhaps even only hours before, a scheduled sentencing hearing.

Any rigid procedural sentencing requirements such as Petitioner's notice rule will impose substantial new burdens on already overburdened district judges. Consider the plight of a district judge who, after reviewing the presentence report's discussion of the defendant's criminal history the day before a scheduled sentencing hearing, is contemplating a variance based on the "protect the public" consideration of Section 3553(a)(2)(C) in a sentencing universe governed by the Petitioner's proposed rule. In this universe, the defendant and his counsel already know about the defendant's criminal history and about the instructions of Section 3553(a), but apparently the district judge is now expected to provide some additional notice about her sentencing thoughts. Would the judge need to immediately provide notice to the parties and still be able to go forward with the scheduled sentencing hearing the next day? Or would only seven or ten days advance notice suffice? Would the judge have to grant a motion to continue the proceeding for weeks or months if counsel responded to the notice by saying he believed he should now seek an expert report on the topic noticed? Such "infirmities of application" counsel against Petitioner's proposed rule. *Gall*, 128 S. Ct. at 595.

Even if this Court were to design a set of benchmarks for timely notice, Petitioner's proposed rule entails other "administrability problems." (Brief at 23). It still leaves uncertain what amount of notice suffices. Is a single sentence indicating a concern about the adequacy of the advisory Guideline range enough? Would a citation to precise facts and materials from the presentencing or trial record be required? Must the judge specify the particular subsections of Section 3553(a) she thinks might

support the variance? Must she indicate how she plans to balance these factors? Faced with these burdens and uncertainties—which grow exponentially if a case involves multiple defendants or complicated Guideline calculations—busy district judges would understandably (perhaps sometimes unconsciously) retreat to the safety of the Guidelines range (in contravention of *Booker*, *Gall* and *Rita*).

Moreover, a district judge often may not have a strong inkling prior to the sentencing hearing whether she plans to impose a variance. Indeed, the whole purpose of the sentencing hearing is so that the judge can approach the matter with an open mind, can consider the evidence presented at that hearing, and can impose a just and effective sentence based on her view of that evidence. As Chief Judge Boudin, speaking for the First Circuit *en banc*, recently explained:

> The district judge draws on information from the trial, the pre-sentence report and the parties' commentary, the defendant's allocution, victims' statements, letters, its own review of these materials before the sentencing hearing and whatever is added during the hearing. Throughout the hearing, the judge may well be revising his views depending on what is presented and how counsel respond to questions. This is a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds.

*United States v. Vega-Santiago*, 2008 WL 451813, at *3.

Petitioner's proposed rule would encourage a judge to approach sentencing hearings with a closed mind. If a district judge decides to impose a sentence

outside the advisory Guidelines range based on something that she learns at the sentencing hearing, a notice rule effectively forces her to continue the sentencing proceeding or to hold another hearing, further adding to the judge's workload and contrary to her charge to sentence promptly. *See* Fed. R. Crim. P. 32(b)(1).

The Crime Victims' Rights Act (CVRA) acutely illustrates the incompatibility of Petitioner's proposed rule with Congress's conception of the purpose of a sentencing hearing. The CVRA, enacted in 2004, grants crime victims the right "to be reasonably heard at any public proceeding in the district court involving . . . sentencing." 18 U.S.C. § 3771(a)(4). Most courts have interpreted this language to entitle a victim to testify at the sentencing hearing, a trend exemplified by the district court's decision in this case allowing Petitioner's ex-wife to testify. (JA 301). *See generally* Douglas E. Beloof, *Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinski in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENTENCING REP. 36 (2006). The victim's right to testify would be hollow if it could not affect the district court's view about the proper sentence, at least in some cases. Yet Petitioner's proposed rule either saps a victim's CVRA right of much value or turns it into a procedural nightmare. In order to impose a non-Guidelines sentence at the end of a hearing in which a victim testifies, a district court effectively must ignore (or pretend to ignore) the victim's testimony and justify the sentence on other grounds; alternatively, if the district court chooses to rely on something that the victim related during the hearing, then again the district court must continue the sentencing proceeding and presumably hold another hearing (at which the victim

presumably again would be entitled to testify). Surely Congress did not envision creating an enforceable right for victims to testify at sentencing hearings only to have that right turned into an empty exercise by judicial creation of a notice requirement appearing nowhere in federal law or the federal rules.

In short, it is essential, especially in light of this court's decision in *Booker*, to preserve flexibility for district judges to exercise their sentencing discretion soundly and in a reasoned and explicit manner. This is hardly controversial. Judges routinely make all sorts of very consequential decisions affecting substantial rights—both in criminal and civil settings—without providing elaborate prior notice to the parties of the exact ground upon which the judge plans to base her decision. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. In some cases, judges will balance the factors in a multifactor balancing test differently than the parties. *See, e.g.*, 18 U.S.C. § 3142 (bail determination). In other cases, judges may connect the facts to the statutory considerations in a manner other than the parties propose. *See, e.g., Planned Parenthood v. Casey*, 510 U.S. 1309, 1310-11 (1994) (Souter, J., in chambers) (application to stay mandate). While the parties' positions set forth in their pleadings help to frame the debate, they certainly do not define the outer boundaries of the judge's discretionary authority. Sometimes, judges resolve cases before them on grounds proposed by neither party. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) ("The Court has not always confined itself to the set of issues addressed by the parties."). Indeed, in the *Booker* remedial opinion which had the potential to affect tens of thousands of

sentences, this Court took a severance approach to the SRA that none of the parties had proposed. 543 U.S. at 266-67; *id.* at 272 (Stevens, J., dissenting in part); *id.* at 309 (Scalia, J., dissenting in part). Viewed against this background, Petitioner's proposed rule challenges the very act of judging.

Not only does a notice requirement complicate the district court's already daunting sentencing tasks, it also risks undermining appellate review. Appellate courts now review sentences for both procedural and substantive reasonableness. *See Gall*, 128 S. Ct. at 598-600; *Rita*, 127 S. Ct. at 2468-69; *Booker*, 543 U.S. at 260-61. To facilitate that review, *Gall* and *Rita* exhort district judges to be explicit and detailed in their reasons for their chosen sentences, especially where those sentences deviate significantly from the advisory Guidelines range. *Gall*, 128 S. Ct. at 594; *Rita*, 127 S. Ct. at 2468; *see also* 18 U.S.C. § 3553(c)(2) (instructing that, if a sentence is imposed outside the Guideline range, the court must state its reasons "for its imposition of the particular sentence . . . with specificity in the written order of judgment and commitment"). An advance notice requirement could make district judges fearful of "adequately explaining" their sentencing decisions. *Gall*, 128 S. Ct. at 597. Whenever a district judge provides the sort of detailed reasoned opinion that was praised in *Gall*, an aggrieved party can scour the judge's sentencing opinion and claim inadequate notice of every jot and tittle of the district court's reasoning. Alternatively, if the district judge describes his reasons in more general terms (such as the heinousness of the offense), an aggrieved party can claim that the judge's decision is not sufficiently reasoned and an appellate court will have to speculate whether

the judge has sufficiently disclosed the "true" reasons for a sentence.

All of these "[p]ractical consideations" counsel against Petitioner's proposed notice rule. *Gall*, 128 S. Ct. at 597. That rule will compound the workload of district judges, prolong sentencing proceedings, and complicate appellate review. Confronted by these challenges, judges understandably will prefer the safe harbor of the Guidelines—one that may reduce procedural burdens and simplify appellate review, but ultimately revives a sentencing system in which the Guidelines are no longer "effectively advisory."

### 3. A criminal defendant receives adequate notice under the existing presentencing process, and other mechanisms can address rare cases of truly unfair surprise.

Petitioner argues (Brief at 26) that *Booker* actually enhances the need for notice. According to Petitioner, following *Booker*, district judges enjoy greater discretion at sentencing than they did at the time of *Burns*, thereby enhancing the need for a notice rule. The existing presentencing procedural structure already provides a defendant with adequate notice about relevant sentencing considerations governing sentencing decisionmaking. Consequently, there is no need to superimpose a universal notice rule burdening district judges in every case in which a variance might be contemplated.

As soon as the defendant pleads or is found guilty, the defendant and his attorney are on notice of (1) the statutory range within which the district court must sentence the defendant, (2) the Guideline and Section 3553(a) factors which can influence the

sentence within that statutory range, and (3) the process by which the district court will render a sentence. Moreover, the process of preparing and reviewing the presentence report with the Probation Office and with opposing counsel necessarily provides parties with considerable notice of the key facts and arguments that are potentially relevant to the Section 3553 factors. Chief Judge Boudin, speaking for the First Circuit *en banc*, succinctly summarized the soundness of this system:

> In the normal case a competent lawyer—and for incompetence other remedies are available—will anticipate most of what might occur at the sentencing hearing—based on the trial, the presentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing.

*Vega-Santiago*, 2008 WL 451813 at *3. In addition to these protections, recent amendments to the Federal Rules of Criminal Procedure, approved by this Court, authorize district judges to require probation officers to consider Section 3553(a) factors in their presentence report, which the defendant receives long before sentencing and to which the defendant may respond. *See* Fed. R. Crim. P. 32(f)(2)(A). Collectively, these procedures ensure the "thorough adversarial testing" of the sentencing issue without the need for Petitioner's notice rule. *Rita*, 127 S. Ct. at 2745.

Admittedly, there may be rare cases in which a district judge imposes a sentence based on facts or information that the parties neither expect nor can reasonably anticipate. *See United States v. Hamad*, 495 F.3d 241 (6th Cir. 2007) (reversing a sentence increased on the basis of letters the judge had received in chambers and kept confidential). Existing procedural mechanisms can and already do address concerns about unfair surprise in rare cases involving these sorts of exceptional circumstances. *See Vega-Santiago*, 2008 WL 451813, at *4. If the district judge indicates an intention to sentence on the basis of "surprise" facts outside the parties' ken, the potentially prejudiced parties can request a continuance (reviewable on appeal) or request the opportunity to provide supplemental briefing. *See Morris v. Slappy*, 461 U.S. 1, 26 (1983); *Pickett v. United States*, 216 U.S. 456, 461 (1910). Moreover, the parties also can file a motion to correct the sentence (also renewable on appeal). *See* 18 U.S.C. § 3582(c)(1)(B); Fed. R. Cr. P. 35(a); 3 Wright *et al.* Fed. Practice & Procedure § 588 (rev. ed. 2008). Finally, if the judge supplies a poor or opaque reason for his sentencing decision, an appellate court can vacate the sentence as unreasonable. *See Rita*, 127 S. Ct. at 2468-69; *Koon*, 518 U.S. at 97-100. These sorts of narrowly tailored remedies eliminate unfair surprises and ensure a sound sentencing process without straitjacketing district judges in the vast majority of cases.

**4. An approach combining a notice requirement with harmless error analysis would be unworkable.**

The Government's Brief in Opposition and its litigating position in recent reported appellate cases

suggests that it prefers a different approach. Under that approach, district courts must provide notice, yet their failure to do so is subject to harmless error review (or plain error review in cases where defendants did not preserve the notice objection). Such an approach carries all the attendant burdens of Petitioner's notice rule and, in several respects, will compound problems with post-*Booker* appellate review of sentences.

First, the sort of harmless error inquiry suggested by the Government will be difficult to conduct on appeal. Typically, the error underlying a harmless error inquiry is an erroneous evidentiary admission or an erroneous jury instruction. *See, e.g., Neder v. United States*, 527 U.S. 1, 9-10 (1999); *Brecht v. Abrahamson*, 507 U.S. 619, 628-29 (1993). In those cases, an appellate court is to decide, based on the entire record, whether the jury (or decisionmaker) would have reached same result. Here the error is of a different breed. It involves the failure to give adequate notice of likely sentencing considerations, which may or may not be expected to trigger a response or change of plans by counsel preparing for sentencing. Any appellate inquiry about the harmlessness of a notice error, therefore, is inherently more speculative. The appellate court cannot simply examine the record to determine whether the result below would be have been the same. Rather, as this case demonstrates well, the parties will be arguing over matters they claim they *would have presented* had they been given notice, matters which often will not be present in the record and may not be subject to sensible appellate scrutiny.

Second, the nature of the judgment in this context differs fundamentally from the typical harmless

error cases. Harmless error typically involves the application of legal elements to facts. For example, when a reviewing court determines that evidence was erroneously admitted in violation of the Fourth Amendment, it then considers whether the decision-maker would have determined that the remaining facts in the record satisfied the elements of the underlying offense. Harmless error inquiry is possible because the error may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). By contrast, in this context, the harmless error inquiry requires the reviewing court to speculate about a multifaceted sentencing judgment made by the district court applying the judgment-oriented considerations set forth in Section 3553(a). It is hard to conceive how the appellate court can undertake this task except by either substituting its own sentencing judgments or by engaging in blind speculation about how a district court might have balanced applicable sentencing considerations differently if it had provided notice and the parties had responded in the ways they now claim on appeal.

**5. Alternatively, this Court should limit *Burns* to its facts.**

Some lower courts have interpreted *Booker* to render obsolete the reasoning underpinning *Burns* and, in some cases, the very concept of departures. *See United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 195-96 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006). These rulings might be viewed as a call for this Court

simply to overrule *Burns*. This Court certainly has the power to do so, *see Agostini v. Felton*, 521 U.S. 203, 236-37 (1997), and such a course certainly would resolve this case. Nonetheless, if this Court is not persuaded that *Burns* is entirely consistent with a regime under which district courts do not have to provide notice prior to imposing a variance, it should just limit *Burns* to its facts.

This Court routinely has adopted this course where subsequent legal developments have made it appropriate to cabin a decision's line of reasoning without overruling the decision. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977); *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966); *Rutkin v. United States*, 343 U.S. 130, 138 (1952); *Salinger v. United States*, 272 U.S. 542, 549 (1926). This course is especially appropriate where "the principle on which [a] decision proceeded is not broader than the situation to which it was applied." *Salinger*, 272 U.S. at 549.

Such a course is appropriate here. *Booker* and its progeny have necessitated reexamination of sentencing law and procedure. Departures remain possible, and Rule 32(h) ensures that the *Burns* rule can play a role for that distinctive sentencing decision in the calculation of the advisory guideline ranges. Limiting *Burns* to its facts in light of *Booker* ensures that the reasoning of the case is not extended to other criminal (or civil) settings that differ from the system of mandatory guidelines analyzed in *Burns*.

### C. To Read A Notice Requirement Into Rule 32 Would Effectively Circumvent The Rulemaking Process, Which Can Better Balance Competing Considerations In The Context Of Advisory Guidelines.

Congress has crafted a clear system for amending federal procedural rules. *See* 28 U.S.C. § 2072(a); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14-15 (1941). In some cases, a federal statute expressly amends the rules. For example, as part of the Sentencing Reform Act of 1984, Congress amended Rule 32 so that parties had an opportunity to comment on matters relevant to sentencing. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §215, 98 Stat. 1987, 2014-15. In other cases, this Court promulgates a package of amendments pursuant to the Rules Enabling Act which are adopted unless Congress rejects those rules within a specified period of time. *See Sibbach*, 312 U.S. at 15. For example, the recent amendment to Rule 32 granting district judges the discretion to have probation officers conduct a Section 3553(a) analysis in the presentence report was adopted in this manner. *See* Fed. R. Crim. P. 32(d)(2)(F). It is undisputed that neither of these processes has yet produced the rule that Petitioner (and the Government) urge this Court to adopt. Indeed, the second process (rulemaking) has, to date, expressly declined to adopt Petitioner's proposed rule. Under these circumstances, Petitioner's proposed judicial circumvention of the rulemaking process should be rejected.

Rulemaking provides a superior method, compared to litigation, for modifying the federal rules. Rulemaking enables this Court and its advisory

committees to consider empirical evidence and input from a broad array of constituencies through a notice and comment process. By contrast, litigation limits the Court to the input by the parties and, in some cases, *amici curiae*.[3] *See Kimbrough*, 128 S. Ct. at

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[3] Petitioner's statistical arguments (Brief at 23) demonstrate the superiority of rulemaking, compared to litigation, as a process to resolve these issues. Citing various statistics, Petitioner intimates that courts sometimes do not specify whether they are engaging in a departure or a variance and, consequently, leave parties in the dark about their entitlement to notice. This argument misinterprets the data in several respects. First, the argument relies on *preliminary* data. *See* United States Sentencing Commission, FY 2007 Preliminary Quarterly Data Report. Elsewhere in that preliminary report, the Commission "caution[s]" that the data are subject to change and stresses that "quarterly data should not be considered final until publication of the Commission's *Sourcebook* and *Annual Report*." *Id.* at 2. The final data, admittedly unavailable by the deadline for Petitioner's brief, indicate that district courts imposed 42,504 sentences within the Guidelines range and 27,389 sentences outside the range. *See* United States Sentencing Commission, FY 2007 Final Quarterly Data Report Table 1 (Mar. 19, 2008). Second and more importantly, Petitioner's argument confuses the Commission's statisticians' coding decisions with the judge's reasons for a sentence. The notes accompanying the data indicate that the Commission's statisticians classified non-Guidelines sentences depending on whether the court indicated it was departing, citing *Booker* or citing Section 3553(a). *Id.* at nn. 2-4. After doing so, the Commission was left with a small group of sentences that "could not be classified." *Id.* Table 1 n.5 & App. A at A-2. Contrary to Petitioner's argument, this classification does not prove that sentencing judges are imposing a non-Guidelines sentence without giving reasons. Third, Petitioner's argument misreads the scope of this residual category. The Commission indicates that this category "includes cases in which no reason was provided for a sentence outside the Guideline range." *Id.* Table 1 n.5. Contrary to Petitioner's argument, this use of the term "includes" does not necessarily mean that this category consists

574. Rulemaking also enables judges, who are often most directly affected by the proposed rule, to provide input, based on their experience, about its likely consequences. *See Mistretta*, 488 U.S. at 389-91. By contrast, judges by virtue of their office, *see* 28 U.S.C. § 455(a), are effectively shut out from providing input on a rule change sought *via* litigation. Finally, rulemaking enables this Court and its advisory committees to consider the wisdom of a rule in light of a broader array of policy alternatives; *cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 864-66 (1984). By contrast, litigation only allows consideration of the narrow question presented by the litigants, irrespective of the competing policy alternatives for addressing an issue.

The issue in this case illustrates particularly well the importance of respecting the rulemaking process as the appropriate method for changing the federal rules. Following *Booker*, the Advisory Committee on the Federal Rules of Criminal Procedure considered and approved a package of three amendments to Rule 32. The first proposal amended Rule 32(d)(2)(F) so that district judges could require probation officers to address the Section 3553(a) factors in the presentence investigative report. As already noted, this Court has adopted that rule. The second proposal created a uniform judgment form for sentencing to facilitate data collection and analysis by the Sentencing Commission. This proposal was withdrawn after a congressional enactment obviated

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*exclusively* of such cases; it also could include cases in which the documents received by the Commission were incomplete or did not permit confident classification, *id.* Tables 27-28 & App. A at A-2-3.

it. *See* Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure at 10 (May 20, 2006).

The third proposal, most central here, would have amended Rule 32(h) so that its notice requirement applied also to variances. Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (Dec. 8, 2005). That proposed amendment, however, sparked a vociferous reaction from federal judges, particularly district judges, who saw the proposed rule as inconsistent with *Booker* or as ill-advised policy. *See* Letter of the Honorable Stewart Dalzell to the Honorable Susan C. Bucklew (Nov. 15, 2005) (criticizing the proposed rule on the grounds that it "fundamentally rewrites Justice Breyer's opinion for the remedial majority in *Booker*" and "assures that many, if not most, sentencing hearings will have to take place at least twice, with consequent costs to the parties, victims and the public, who all have a right to attend such important proceedings"); Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 5 (summarizing the opposition of several judges to proposed amendment). The rule was referred back to the advisory committee, which only recently formed a subcommittee to study the issue further.

Other rules in the post-*Booker* system may reduce the need for Petitioner's proposed rule. As noted above, Rule 32(d)(2)(F) now authorizes district judges to require probation officers to include a

Section 3553(a) analysis in their presentence report. Time will reveal whether district judges avail themselves of that opportunity and whether that process regularly provides the parties with notice of possible grounds upon which a district judge might impose a sentence outside the advisory guidelines range.

To adopt Petitioner's proposal at this time would undercut the well-designed rulemaking process. It allows the litigants to circumvent that process and, thereby, deprives this Court of the benefits that come through careful consideration of empirical evidence and available alternatives. Such a risk is particularly acute where, as here, the Justice Department has altered its position, effectively aligning itself with Petitioner in support of a notice requirement. *See, e.g., United States v. Walker*, 447 F.3d 999, 1007 n.7 (7th Cir. 2006). The only way to ensure that other affected parties, particularly district judges, can "participate in an ongoing manner to improve the various sentencing schemes in our country" is to have the rulemaking process, rather than litigation, determine the wisdom of a new advanced notice requirement following *Booker*. *Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting). Therefore, out of respect for the integrity of this rulemaking process, the Court should decline Petitioner's invitation to expand Rule 32's notice requirements.

### D. The Principle Of Constitutional Doubt Does Not Require Petitioner's Proposed Rule

Petitioner argues (Brief at 24-25) that the canon of constitutional doubt supports interpreting Rule 32 to require notice prior to the imposition of a Section

3553(a) sentence. Relying primarily on this Court's opinion in *Townsend v. Burke*, 334 U.S. 736 (1948), Petitioner appears to suggest that a contrary rule would run afoul of the Due Process Clause. Contrary to Petitioner's argument, the canon of constitutional doubt does not support the Petitioner's proposed rule for two main reasons.

First, Rule 32 is unambiguous. This Court has repeatedly held that the canon of constitutional doubt does not apply to an unambiguous provision. *E.g.*, *Miller v. French*, 530 U.S. 327, 341 (2000); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). In this case, Rule 32 on its face does not mandate notice prior to the imposition of a Section 3553(a) sentence and, as detailed above, the rule's structure, history and underlying policy do not provide the interpretive wiggle room necessary to support Petitioner's proposed construction.

Second, procedural due process does not require the notice rule that Petitioner seeks. As an initial matter, Petitioner's proposed rule lacks the necessary historical pedigree. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. Historical practice can shed light on the requirements of due process. *See Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856); *Godinez v. Moran*, 509 U.S. 399, 404 (1993) (Kennedy, J., concurring). While "the sentencing process . . . must satisfy the requirements of the Due Process Clause," *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), this Court has

recognized few historical constraints on discretionary sentencing practices, at least in the noncapital context. *See, e.g., Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and the types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); *Gall*, 128 S. Ct. at 605 & n.1 (Alito, J., dissenting) (describing discretionary system of sentencing that prevailed at the time the Bill of Rights was adopted); *Cunningham v. California*, 127 S. Ct. 856, 874 & n.1 (2007) (Alito, J. dissenting) (same). So long as the judge did not impose a sentence outside the permissible statutory maximum, *see Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974), and did not impose a sentence predicated on inaccurate information, *see Townsend*, 334 U.S. at 741, neither the Constitution nor federal law meaningfully constrained the sentencing judge. As the history of Rule 32 indicates, the defendant's very entitlement to a presentence report is of relatively recent vintage. *See* 1966 and 1975 Notes of the Advisory Committee on the Federal Rules of Criminal Procedure. Likewise, the states historically did not observe the sort of pre-sentence notice requirement that Petitioner seeks. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. Thus, to the extent history supplies the relevant reference point, the Due Process Clause does not support Petitioner's proposed rule.

History may well end the due process inquiry in this case. Although this Court sometimes analyzes procedural due process questions under the multi-

factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), Petitioner does not urge its application here (Brief at 24-25). Several of this Court's decisions expressly hold that the *Mathews* inquiry is inappropriate in certain contexts, including criminal cases. *See, e.g., Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002); *Weiss v. United States*, 510 U.S. 163, 177 (1994); *Medina*, 505 U.S. at 442-45. *Medina* is especially instructive, for there the Court stressed that the *Mathews* inquiry was almost never suited to an assessment of procedural rules in a criminal case. 505 U.S. at 443 ("[T]he expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."). While *Medina* arose in the context of a state criminal case, this fact was not essential to the Court's reasoning—understandably so, because the dual appearance of a due process guarantee in both the Fifth and the Fourteenth Amendments ensures that any judicial exposition on the requirements of due process will influence federal and state practice alike.

Federalism principles support *Medina*'s extension to this context. "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that [this Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citation omitted). Yet that is precisely what Petitioner's (and the Justice Department's) proposed notice rule would do. Several states employ discretionary sentencing systems that do not necessarily

require the trial judge to provide prior notice of his intended sentence. *See Cunningham*, 127 S. Ct. at 871 n.18. Requiring notice as a matter of constitutional law prior to the imposition of an unexpected noncapital sentence obviously would throw open state criminal sentences to a host of new and unprecedented challenges—such as whether notice was required; if so, was it timely, and if so, was it adequate. In short, they would usher in an era of litigation over the scope of these newly minted constitutionally required notice rules, clogging up state courts on direct appeal, this Court on direct review, and federal courts in habeas corpus review.

Even if *Mathews* applied, Petitioner's proposed rule would find no refuge in that doctrine. Under it, the Court considers three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335. *Accord Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

In this case, the private interest—namely a criminal defendant's interest in a Guideline sentence—is moderate at best. Criminal defendants obviously have a legitimate interest in the duration of their sentences. *Cf. Burns*, 501 U.S. at 148 (Souter, J., dissenting). Yet, after *Booker*, their interest in a

Guideline sentence is less compelling. Prior to *Booker*, defendants generally expected a sentence within a narrow range set forth by the Guidelines. *Id.* Following *Booker*, defendants and their counsel are inherently on notice that they can be sentenced anywhere within the statutory range and that the Section 3553(a) factors will guide the district judge's discretion. Moreover, the difference between the recommended range and the statutory maximum may be slight. Here, for example, the difference between the recommended range and the statutory maximum, ultimately imposed by the district judge, was only nine months. Thus, criminal defendants only have at best a moderate interest in a Guideline sentence, an interest less weighty following this Court's decision in *Booker*.

The Government's interest is weighty. This factor of the *Mathews* test entails a far broader array of governmental interests than simply those expressed in the Solicitor General's litigation position. *See Burns*, 501 U.S. at 149 (Souter, J., dissenting). A variety of governmental entities in this case, including Congress, probation officers, and especially federal district judges, have a significant interest in the "fiscal and administrative burdens" imposed by Petitioner's proposed notice rule. *See* Administrative Office of the United States Courts, Annual Report of the Director 35-36 (2006) (describing the financial and administrative impact of *Booker* on the workload of the federal judiciary); L. Ralph Mecham, *Report on the Impact of the* Booker *Case on the Workload of the Federal Judiciary* (June 2006) (same). Notice requirements sap judicial resources. *Burns*, 501 U.S. at 149 (Souter, J., dissenting). As detailed above, *supra* at 31-36, a notice rule likely will drag out the sentencing hearing and place an additional strain on

already stretched judicial resources. *See supra* at 34-35.

Synthesizing these factors of the *Mathews* test, therefore, the interest balance cuts against a notice requirement. Even if the interest balance is not conclusive, the procedural due process analysis then boils down to two basic questions: (1) how substantial is the risk of an erroneous deprivation of the defendant's interest in a Guideline sentence and (2) what is the probable value (if any) of an additional notice requirement. To frame this issue appropriately, it is necessary to consider the procedural guarantees that already accompany the sentencing hearing. *See generally United States v. Ausburn*, 502 F.3d 313, 322-27 (3d Cir. 2007). A criminal defendant already has notice of the range to which he can be sentenced (the statutory maximum). He has notice of the grounds upon which the judge will base the sentence (the Section 3553(a) factors). He receives a copy of the presentence report (which details the facts relevant to sentencing and can include an analysis of the Section 3553(a) factors). He has an opportunity to comment upon this report. He likely has advance notice of the witnesses that the prosecution will call at the sentencing hearing. Finally, he participates in the hearing where his counsel can present evidence and make arguments on matters relevant to the sentence.

Given the notice already available under current law, the constitutional question is whether yet another layer of notice is necessary. *See Greenholtz*, 442 U.S. at 14. Here, any "risk of an erroneous deprivation" of a defendant's liberty is minimal at best. Petitioner seems to suggest (Brief at 24-25) that notice here is necessary to reduce the risk

of a sentence based on inaccurate or misleading information. Yet Petitioner makes no showing that the nine month increase imposed by the district judge actually was based on any such misinformation. Thus, there is simply no indication that a notice rule would have served any meaningful error-correction function in Petitioner's case.

Even if Petitioner could point to more than a hypothetical risk of sentencing error, existing mechanisms can correct any error. *See Wilkinson*, 545 U.S. at 226-27 (opportunity for subsequent review of decision reduces risk of erroneous deprivation by original decisionmaker); *Gilbert v. Homar*, 520 U.S. 924, 934-35 (1997) (same). Under the recently adopted post-*Booker* revisions to Rule 32, a district judge can require the probation officer to include an analysis of facts relevant to the Section 3553(a) considerations, thereby reducing the risk of any unfair "surprise" at sentencing. Moreover, the district judge must give reasons for his sentence, with the required degree of reasoning correlated with the degree to which the sentence deviates from the recommended Guidelines range. *Rita*, 127 S. Ct. at 2468-69. Finally, under the appellate standard set forth by this Court in *Booker* and elaborated upon in *Rita* and *Gall*, appellate courts will continue to review the sentence for both procedural and substantive reasonableness. *See Gall*, 128 S. Ct. at 597. Thus, the marginal "error-correction" benefit of Petitioner's proposed rule is at best minimal.

For all of these reasons, the canon of constitutional doubt does not require interpreting Rule 32 to require notice prior to the imposition of a Section 3553(a) sentence outside the range recommended by the advisory guidelines.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# JOINT APPENDIX

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In The
# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of California**

## JOINT APPENDIX

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# RELEVANT DOCKET ENTRIES

CALIFORNIA COURT OF APPEAL
Second Appellate District
Case No. B166937

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The People of the State of California

v.

Dwayne Giles

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| Date | Description | Notes |
|---|---|---|
| 05/07/2003 | Notice of appeal lodged/received (criminal). | n/a 4/30/03 Dwayne Giles |
| 06/04/2003 | Counsel appointment order filed. | Marilyn G. Burkhardt |
| 07/03/2003 | Record on appeal filed. | C-1 (180) & R-6 (approx. 500) + Prob. Report |
| 09/17/2003 | Supplemental record/transcript filed. | C-1 (7) & R-1 (242) + AOB 30 days |
| 12/23/2003 | Appellant's opening brief. | Attorney: Burkhardt, Marilyn G. Party: Giles, Dwayne **40(k)** (12-22-03) |
| 06/01/2004 | Respondent's Brief | 40(k) – mailed 5/28/04 Attorney General Party: The People |

| | | |
|---|---|---|
| 06/21/2004 | Appellant's reply brief. | 40(k) – certified mail 6-17-04 Party: Giles, Dwayne |
| 06/21/2004 | Case fully briefed. | |
| 06/24/2004 | Letter sent to: | all counsel requesting supplemental letter briefs re "Crawford v. Washington" |
| 07/26/2004 | Supplemental brief filed by: | (permission – 10 days late) Party: Giles, Dwayne |
| 07/29/2004 | Supplemental brief filed by: | 40(k) – mailed 7/28/04 Office of the Attorney General Party: The People |
| 09/08/2004 | Filed document entitled: | Request for Permission to File A Supplemental Reply Brief (Granted by PJ Gilbert) |
| 09/08/2004 | Supplemental brief filed by: | Supplemental Reply Brief (permission) Burkhardt, Marilyn G. Party: Giles, Dwayne |
| 09/09/2004 | Cause argued and submitted. | |
| 10/25/2004 | Opinion filed. | AFF/CFP/14P/C-G-P |

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|---|---|---|
| 11/09/2004 | Rehearing petition filed. | 40(k) – mailed 11/8/04. Respondent. |
| 11/12/2004 | Rehearing petition filed. | 40(k) – certified mail 11/9/04. Aplnt. |
| 11/22/2004 | Mod. of opinion filed (no change in judgment) | & order denying rehearing. CFP |
| 12/13/2004 | Petition for review in Supreme Court received. | |
| 12/13/2004 | Record transmitted to Supreme Court. | one (1) 6-inch doghouse via UPS |
| 05/29/2007 | Remittitur received from Supreme Court. | Issued by Supreme Court on 5/23/07. |
| 05/31/2007 | Remittitur issued. | Supreme Court remittitur attached to our remittitur and sent to all parties. |
| 05/31/2007 | Case complete. | |

CALIFORNIA SUPREME COURT
Case No. S129852

The People of the State of California

v.

Dwayne Giles

| Date | Description | Notes |
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| 12/07/2004 | Petition for review filed | counsel for appellant, DWAYNE GILES [40k] |
| 12/22/2004 | Petition for review granted; issues limited (criminal case) | The issues to be briefed and argued are limited to the following: Did defendant forfeit his Confrontation Clause claim regarding admission of the victim's prior statements concerning an incident of domestic violence (see Evid. Code § 1370) under the doctrine of "forfeiture by wrongdoing" because defendant killed the victim, thus rendering her unavailable to testify at trial? Does the doctrine apply where the alleged |

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| | | "wrongdoing" is the same as the offense for which defendant was on trial? Werdegar, J., was absent and did not participate. Votes: George, C.J., Kennard, Baxter, Chin, and Moreno, JJ. |
| 01/12/2005 | Counsel appointment order filed | Marilyn Burkhardt for appellant (Giles). |
| 05/10/2005 | Opening brief on the merits filed | (with permission) Appellant Giles |
| 11/21/2005 | Received: | answer brief/merits submitted with app/to exceed word limit [respondent] |
| 11/28/2005 | Answer brief on the merits filed | Respondent (The People). (filed with permission). |
| 12/12/2005 | Received application to file amicus curiae brief | by California Partnership To End Domestic Violence (CPEDV) and 14 other domestic violence agencies, in support of respondent (People) |
| 12/15/2005 | Permission to file amicus curiae brief granted | The application of California Partnership To End Domestic Violence |

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| | | (CPEDV) and 14 other domestic violence agencies for permission to file an amicus curiae brief in support of respondent is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief. |
| 12/15/2005 | Amicus curiae brief filed | California Partnership To End Domestic Violence (CPEDV) and 14 other domestic violence agencies in support of respondent. |
| 12/22/2005 | Permission to file amicus curiae brief granted | The application of the National Crime Victim Law Institute for permission to file an amicus curiae brief in support of respondent is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief. |

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| 12/22/2005 | Amicus curiae brief filed | The National Crime Victim Law Institute in support of respondent. |
| 05/03/2006 | Received: | Appellant's oversized (11,520 words) Reply Brief on the Merits, over the 4,200 word limit, pursuant to CRC rule 29.1(c)(4). (40.1(b)) |
| 05/05/2006 | Response to amicus curiae brief filed | Appellant's Answer to the Amicus Curiae Brief by the California Partnership to End Domestic Violence et al. (CRC 40.1(b)) |
| 05/08/2006 | Reply brief filed (case fully briefed) | Appellant Dwayne Giles by Marilyn G. Burkhardt, Supreme Court appointed counsel |
| 11/07/2006 | Case ordered on calendar | Wednesday, December 6, 2006, at 1:30 p.m., in Los Angeles |
| 11/27/2006 | Supplemental brief filed | Appellant Dwayne Giles, by Marilyn G. Burkhardt, appointed counsel CRC 40.1(b)/FedEx |

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| 11/27/2006 | Supplemental brief filed | Respondent People, by Russell A. Lehman, Deputy Attorney General – L.A. CRC 40.1(b)/ UPS/Next Day Air |
| 12/06/2006 | Cause argued and submitted. | |
| 03/05/2007 | Opinion filed: Judgment affirmed in full | Court of Appeal's judgment. Opinion by Chin, J. – joined by George, CJ., Kennard, Baxter, Corrigan, J. Concurring Opinion by Werdegar, J. – joined by Moreno, J. |
| 03/21/2007 | Received: | Letter dated 3-20-2007 from Paul L. McKaskie, Professor of Law, University of San Francisco School of Law requesting modification of the opinion. |
| 03/23/2007 | Rehearing petition filed | Dwayne Giles, appellant by Marilyn G. Burkhardt, Supreme Court appointed counsel CRC 8.25 |

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| 05/23/2007 | Rehearing denied | The request for modification of the opinion is denied. |
| 05/23/2007 | Remittitur issued (criminal case) | |
| 06/01/2007 | Received: | Acknowledgement of receipt of remittitur from James Terry, Deputy Clerk, CA2/Div. 6 (Ventura) |
| 08/27/2007 | Received: | Letter dated 8-23-2007 from Supreme Court of the United States, Office of the Clerk, petition for writ of certiorari was filed on 8-20-2007 and placed on the docket 8-23-2007 as No. 07-6053. |
| 01/18/2008 | Received: | Supreme Court of the United States Letter dated January 11, 2008. Re: Dwayne Giles v. California No. 07-6053 (Our No. S129852) "The court entered the following order in the above-entitled |

case: The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The brief of petitioner is to filed on or before Wednesday, February 20, 2008. The brief of respondent is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court."

123 Cal.App.4th 475

Court of Appeal, Second District,
Division 6, California.
The PEOPLE, Plaintiff and Respondent,
v.
Dwayne GILES, Defendant and Appellant.
**No. B166937.**

Oct. 25, 2004.
As Modified on Denial of Rehearing Nov. 22, 2004.
Review Granted Dec. 22, 2004.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

COFFEE, J.

Appellant Dwayne Giles was sentenced to prison for a term of 50 years to life after a jury convicted him of first degree murder and found true an allegation that he had personally discharged a firearm causing great bodily injury or death. (Pen.Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).) He contends he was denied his Sixth Amendment right to confront witnesses because the trial court admitted hearsay evidence of statements by the murder victim regarding a prior act of domestic violence. He also argues that his conviction must be reduced to second degree murder because the evidence was insufficient to show

that he acted with premeditation and deliberation. We conclude appellant has forfeited his Confrontation Clause arguments through his own wrongdoing and the evidence was sufficient to support the judgment.

## FACTS

Appellant dated Brenda Avie for several years. On the night of September 29, 2002, he was staying at his grandmother's house along with several other family members. Appellant was out in the garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend Tameta Munks when appellant's grandmother called him into the house to take a telephone call from Avie. He then returned to the garage and spoke to Munks, who then left.

Avie arrived at the house about 15 minutes later, after Munks had already left. She conversed with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard Avie and Banks leaving the garage together. A few minutes later, she heard appellant and Avie speaking to one another outside in a normal conversational tone. Avie then yelled "Granny" several times, and Smith heard a series of gunshots.

Smith and appellant's grandmother ran outside and discovered appellant holding a nine millimeter handgun and standing about 11 feet from Avie, who was bleeding and lying on the ground. Appellant's grandmother took the gun from him and called 911.

Smith drove appellant away from the house at his request, but he jumped out of her car and ran away after they had traveled several blocks. Appellant did not turn himself in to police and was eventually arrested on October 15, 2002.

Avie had been shot six times in the torso area. Two of those wounds were fatal; one was consistent with her holding up her hand at the time she was shot; one was consistent with her having turned to her side when she was shot; and one was consistent with the shot being fired while she was lying on the ground. Avie was not carrying a weapon when she was shot.

Appellant testified at trial and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie would get very jealous of other women, including Tameta Munks, whom he had been dating. Appellant knew that Avie had shot a man before she met him, and he had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions.

According to appellant, he had a "typical" argument with Avie when she called him on the telephone on the day of the shooting. He told her Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Appellant told Munks to leave because he was worried about the situation, and Avie arrived soon after.

Appellant told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later and told appellant she knew Munks was returning and she was going to kill them both. Appellant stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and appellant, afraid she had something in her hand, fired several shots. Appellant testified that it was dark and his eyes were closed as he was firing the gun. He claimed that he did not intend to kill her.

Marie Banks testified that she had seen appellant and Avie get into arguments before. Avie seemed angry when she came to appellant's grandmother's on the day of the shooting, and she talked to appellant for about half an hour until appellant told everyone to leave. Avie and Banks left together, but as they were walking away they saw Tameta Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward appellant's grandmother's house and Banks went home. Banks did not see the shooting itself.

## DISCUSSION

### *Right of Confrontation-Forfeiture by Wrongdoing*

A few weeks before the shooting in this case, police officers investigated a report of domestic violence involving appellant and Avie. Evidence about the

incident was offered by the prosecution to prove appellant's propensity for domestic violence under Evidence Code section 1109. Officer Stephen Kotsinadelis testified that when he and his partner responded to a call on September 5, 2001, appellant answered the door, apparently agitated, and allowed him to enter. Avie was sitting on the bed, crying. Kotsinadelis interviewed Avie while his partner spoke to appellant in a different room. Avie said she had been talking to a female friend on the telephone when appellant became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with appellant, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but appellant climbed on top of her and punched her in the face and head. After Avie broke free again, appellant opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you." Officer Kotsinadelis saw no marks on Avie, but felt a bump on her head.

Avie's hearsay statements to Officer Kotsinadelis were admitted over defense counsel's objection. The trial court ruled the statements were admissible under Evidence Code section 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury upon

the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy.[1]

Citing the recent United States Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, which was issued after the trial in this case, appellant argues that the admission of Avie's statements to Officer Kotsinadelis violated his rights under the Confrontation Clause of the federal Constitution. (U.S. Const., 6th & 14th Amends.) In *Crawford,* the court held that "testimonial" hearsay was admissible only when the declarant was unavailable *and* the defendant has had an opportunity to cross-examine the declarant. Overruling former case law that permitted the introduction of hearsay evidence so long as it fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness, the court announced a new rule of constitutional law: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands

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[1] Evidence Code section 1370 provides in relevant part, "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official."

is the one the Constitution actually prescribes: confrontation." (*Id.*, 541 U.S. at pp. 68-69, 124 S.Ct. at p. 1374, overruling *Ohio v. Roberts* (1980) 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597.) Appellant contends that Avie's statements to Officer Kotsinadelis were testimonial and should have been excluded.

The resolution of this issue is not obvious from *Crawford* itself, which declined to "spell out a comprehensive definition of 'testimonial.'" (*Crawford v. Washington, supra,* 541 U.S. at p. 68, 124 S.Ct. at p. 1374.) "Whatever else the term covers, it applies at minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.* These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid.*, italics added.) The court used "interrogation" in its "colloquial, rather than any technical legal, sense" (*Id.*, 541 U.S. at p. 71, fn. 4, 124 S.Ct. at p. 1365, fn. 4), and some decisions interpreting *Crawford* have construed an initial interview such as the one conducted by Officer Kotsinadelis to be an "interrogation" producing testimonial statements. (*E.g., People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402, 13 Cal.Rptr.3d 753; *Moody v. State* (2004) 277 Ga. 676, 594 S.E.2d 350, 354; *State v. Clark* (N.C. 2004) 598 S.E.2d 213, 219-220.) Other courts, however, have concluded that informal statements to police about a crime that has just occurred are not the functional equivalent of in-court testimony and are not testimonial within the

meaning of *Crawford*. (*E.g., Hammon v. State* (Ind.2004) 809 N.E.2d 945, 952-953.)

We need not resolve whether Avie's statements to Officer Kotsinadelis were testimonial. Assuming they were, we agree with the Attorney General that appellant is barred from asserting a Confrontation Clause objection under the doctrine of forfeiture by wrongdoing. This doctrine embraces the equitable principle that a defendant who has rendered a witness unavailable for cross-examination through a criminal act (in this case, homicide) may not object to the introduction of hearsay statements by the witness on Confrontation Clause grounds. (*See United States v. Emery* (8th Cir. 1999) 186 F.3d 921, 926.) *Crawford* specifically recognized and accepted forfeiture by wrongdoing as an exception to its rule that confrontation is a prerequisite to the admission of testimonial hearsay statements. (*Crawford v. Washington, supra,* 541 U.S. at pp. 61-62, 124 S.Ct. at p. 1370.)

The California Supreme Court has not addressed the applicability of forfeiture by wrongdoing to a Confrontation Clause violation, but the doctrine has a lengthy history and is recognized by the federal courts and those of several sister states.[2] (*E.g., United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, 1359;

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[2] One Court of Appeal recently held that forfeiture by wrongdoing barred the defendant's *Crawford* challenge to a statement by the murder victim that was introduced as a dying declaration. (*People v. Jiles* (2004) 122 Cal.App.4th 504, 18 Cal.Rptr.3d 790.)

*State v. Gettings* (1989) 244 Kan. 236, 769 P.2d 25, 28-29; *Holtzman v. Hellenbrand* (N.Y. 1983) 92 A.D.2d 405, 460 N.Y.S.2d 591, 597; *People v. Moore* (Colo.Ct.App. 2004, 01CA1760) 117 P.3d 1, 2-3, 2004 WL 1690247, *4.) More than a hundred years ago, the United States Supreme Court explained the rule as follows: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." (*Reynolds v. United States* (1878) 98 U.S. 145, 158, 25 L.Ed. 244.) To put it more bluntly: "The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him." (*United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 630, superseded by statute on other grounds as stated in *United States v. Zlatogur* (11th Cir. 2001) 271 F.3d 1025, 1028.)

Appellant argues that a defendant forfeits a Confrontation Clause objection through wrongdoing only when he is charged with or is under investigation for a crime, and wrongfully procures the witness's absence from trial with the intent of preventing testimony about that crime. He relies on *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1280, in which the court described the doctrine of forfeiture by wrongdoing as applying when the defendant "(1) causes

a potential witness's unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial." Appellant correctly notes that in this case, there was no evidence he shot Avie with the intention of preventing her testimony at some future trial.

*Houlihan's* formulation of forfeiture by wrongdoing was primarily a response to a defense argument that the doctrine did not apply when a witness was murdered before formal charges were filed against the defendant. (*United States v. Houlihan, supra,* 92 F.3d at pp. 1279-1280.) Although the opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right to confrontation, we see no reason why the doctrine should be limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable. Other courts have applied forfeiture in cases where the defendant is charged with the same homicide that rendered the witness unavailable, rather than with some underlying crime about which the victim was going to testify. (*See also United States v.*

*Emery, supra,* 186 F.3d at p. 926; *United States v. Miller* (2d Cir. 1997) 116 F.3d 641, 667-668; *State v. Meeks* (2004) 277 Kan. 609, 615, 88 P.3d 789, 794; *People v. Moore, supra,* 117 P.3d at pp. 2-3, 2004 WL 1690247, *4.)[3]

Appellant notes that if forfeiture by wrongdoing is applied to cases in which the defendant is on trial for the very crime that has rendered the witness unavailable, the trial court will be required "'to conclude in essence, as a predicate for admissibility of the evidence, that the defendant is guilty of the very crime with which he is accused.'" This "problem" does not undermine the equitable reasons for the forfeiture doctrine and does not present the trial court with any undue procedural difficulty.

In a case where hearsay statements of a homicide victim are offered in the face of a Confrontation Clause objection, the court will have to determine the preliminary facts necessary for the admission of the evidence, as it would with any other hearsay statement. (Evid.Code, § 310, subd. (a).) If the prosecution urges the court to rule that the defendant forfeited a Confrontation Clause objection by unlawfully and intentionally killing the victim, the court

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[3] Rule 804(b)(6) of the Federal Rules of Evidence establishes a hearsay exception for "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was *intended to,* and did, procure the unavailability of the declarant as a witness." (Italics added.) Our analysis here is not confined by a comparable statutory provision. (Contrast Evid.Code, § 1350.)

will determine forfeiture as a preliminary factual issue. In making this determination, it may consider the evidence admitted thus far at trial and may hold a hearing to take additional evidence outside the presence of the jury. (Evid.Code, § 402, subd. (b).) Assuming there is sufficient evidence to demonstrate forfeiture, the court will admit the evidence. This ruling will not infringe in any way upon the ultimate question for the jury's resolution – whether the defendant is guilty beyond a reasonable doubt of the homicide as charged.

A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case. For example, qualifying hearsay statements by coconspirators may be admissible against a defendant who is charged with conspiracy, even though the existence of the charged conspiracy is a preliminary fact that must be proved by a preponderance of the evidence before the statement is admitted. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61-63, 98 Cal.Rptr.2d 911; *People v. Cooks* (1983) 141 Cal.App.3d 224, 311-312, 190 Cal.Rptr. 211.) The court is no less able to make a threshold determination as to whether a defendant charged with murder unlawfully caused the victim's death for purposes of the forfeiture rule.

This brings us to the degree of proof necessary for the trial court to admit hearsay evidence based on a defendant's forfeiture of rights under the Confrontation Clause of the Sixth Amendment. Our colleagues in the Third District have applied a standard of clear

and convincing evidence when the defendant is alleged to have forfeited his Sixth Amendment right to appointed counsel through misconduct. (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 949, 132 Cal.Rptr.2d 585.) The People argue that the burden of proof should be preponderance of the evidence because: (1) Evidence Code section 115 provides that the burden of proof is preponderance except as provided by other law; (2) neither federal law nor the federal Constitution requires that forfeiture be proved by more than a preponderance; and (3) the truth-in-evidence provisions of article 1, section 28 of the California Constitution prevent us from applying a more stringent evidentiary standard than is required by the federal Constitution. We leave the issue of the appropriate burden of proof for another day, because in this case, there was clear and convincing evidence that appellant procured Avie's unavailability through criminal conduct – a criminal homicide. Although he claimed at trial that he lawfully shot her in self-defense, the evidence supporting this theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable. Appellant has forfeited his Confrontation Clause challenge to Avie's statements.[4]

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[4] The issue of forfeiture by misconduct was not litigated below because the evidence of Avie's hearsay statements was admitted under a statutory hearsay exception that appeared to be valid at the time of appellant's pre-*Crawford* trial. (*See People v. Kons* (2003) 108 Cal.App.4th 514, 522, 133 Cal.Rptr.2d 520 [upholding Evidence Code § 1370].) We address the issue for the

(Continued on following page)

Our holding today is a narrow one. Though we recognize that a defendant may forfeit the ability to assert the constitutional right of confrontation as to hearsay statements by a victim he or she has killed, the application of this rule is subject to several limitations.

First, forfeiture by wrongdoing does not automatically render hearsay statements by an absent witness admissible. Prior statements by an unavailable witness must still fall within a recognized hearsay exception. In this case, Avie's statements were admissible under Evidence Code section 1370 so long as they did not run afoul of *Crawford.* Appellant's procurement of Avie's absence operates as a forfeiture of his right to claim a Confrontation Clause violation under *Crawford,* but it did not provide an independently sufficient basis for admitting Avie's statements. The equitable doctrine of forfeiture by wrongdoing must therefore be distinguished from Evidence Code section 1350, which establishes an independent hearsay exception in serious felony cases for out-of-court statements made by an unavailable witness when "there is clear and convincing evidence that the

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first time on appeal because it was undisputed that Avie was unavailable to testify because of her death and that her death was the result of appellant's actions. (*See People v. Moore, supra,* 117 P.3d at p. 5.) An evidentiary ruling, such as the one admitting Avie's statements to Officer Kotsinadelis, will be upheld on appeal if it is correct on any theory, even if the trial court did not rely on that theory in making its ruling. (*People v. Zapien* (1993) 4 Cal.4th 929, 976, 17 Cal.Rptr.2d 122, 846 P.2d 704.)

declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant."[5] (*See also* Fed. Rules Evid., rule 804(b)(6).)

Second, a defendant can only be deemed to have forfeited his right of confrontation through an intentional criminal act. Although we have concluded that the defendant need not additionally possess the purpose of rendering the witness unavailable for trial, it is not enough to commit some act that incidentally produces that result. In this case, for example, Avie was killed because appellant intentionally fired a gun at her; it is perfectly appropriate to conclude that in doing so, he forfeited his right to confront her in the

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[5] We reject the People's argument that the forfeiture of a Confrontation Clause objection by wrongdoing necessarily forfeits a hearsay objection to the same evidence. The rule proposed by the People would effectively create a hearsay exception for all statements by a witness whom the defendant has rendered unavailable. The narrow drafting of Evidence Code section 1350 demonstrates that the Legislature intended such an exception to apply only in very limited circumstances: when the crime charged was a serious felony, when the defendant killed or kidnapped the witness and when the defendant did so for the purpose of preventing arrest or prosecution. Adhering to the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), we will not imply a broader hearsay exception based on forfeiture by wrongdoing than that which has been specified by statute. (*See generally People v. Oates* (2004) 32 Cal.4th 1048, 1057, 12 Cal.Rptr.3d 325, 88 P.3d 56.)

event her hearsay statements were offered as evidence in some future criminal prosecution. By contrast, if Avie had instead been killed in an unintentional automobile collision while appellant was driving, he would have been the technical cause of her unavailability at any future trial, but his actions could not be construed as a forfeiture of his right to confront her as a witness.

Third, because forfeiture by wrongdoing is equitable in nature, the trial court cannot apply the doctrine when it would be unjust to do so. Avie's hearsay statements to Officer Kotsinadelis were admitted under a statutory hearsay exception that required a finding of trustworthiness. (*See* Evid.Code, § 1370, subd. (a)(4).) It is not clear whether *non* testimonial hearsay statements are still subject to the pre-*Crawford* method of assessing Confrontation Clause challenges, which asked whether the hearsay was admitted under a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. (*See Crawford v. Washington, supra,* 541 U.S. at pp. 57-62, 68-70, 124 S.Ct. at pp. 1368-1370, 1374.) It may, however, be unjust to use the forfeiture doctrine to admit a hearsay statement that does not contain sufficient indicia of trustworthiness. A defendant may reasonably be deemed to have forfeited the right to challenge reliable and trustworthy hearsay if his intentional and wrongful conduct makes the declarant unavailable; it is not so clear that he forfeits his right to challenge all hearsay statements against him, no matter how unreliable.

Fourth, in those cases where the court finds forfeiture of a Confrontation Clause objection based on the defendant's commission of an intentional criminal act, the jury shall not be advised of the finding. The hearsay evidence will simply be admitted over the defendant's objection, and the jury will draw no inference about the ultimate issue of guilt based on the ruling itself.

With these qualifications, we have no problem concluding that in this case forfeiture by wrongdoing is both amply supported by the record and equitable under the circumstances. Appellant cannot be heard to complain that he was unable to cross-examine Avie about her prior, trustworthy statements to law enforcement when it was his own criminal violence that made her unavailable for cross-examination.

*Sufficiency of the Evidence – Premeditation and Deliberation*

Appellant contends the evidence was insufficient to prove that he acted with the premeditation and deliberation necessary to support his conviction of first degree murder. As with any challenge to the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, 26 Cal.Rptr.2d 23, 864 P.2d 103.) The evidence must be viewed in the light most favorable to the judgment, and reversal is unwarranted unless it appears "'that

upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, 75 Cal.Rptr.2d 412, 956 P.2d 374.) We will uphold a judgment against a sufficiency challenge when the circumstances reasonably justify the jury's factual findings, even if the circumstances could be reconciled with a contrary finding. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793, 42 Cal.Rptr.2d 543, 897 P.2d 481.)

In the context of a first degree murder conviction, "premeditated" means "considered beforehand" and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (CALJIC No. 8.20; *People v. Mayfield* (1997) 14 Cal.4th 668, 767, 60 Cal.Rptr.2d 1, 928 P.2d 485.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" (*Mayfield,* at p. 767, 60 Cal.Rptr.2d 1, 928 P.2d 485.)

Viewed in the light most favorable to the judgment, the evidence showed that appellant retrieved a loaded gun from inside the garage after Avie returned to the house. He prepared it to fire by disengaging its safety and then shot her six times in the torso area of her body. One of the investigating officers testified that a semiautomatic firearm such as the one used by

appellant fires only once each time the trigger is pulled, meaning that appellant would have had to pull the trigger for each shot. A reasonable jury could infer that appellant made a cold and calculated decision to take Avie's life after rapidly weighing the considerations for and against this course of action. (*See People v. Mayfield, supra,* 14 Cal.4th at p. 767, 60 Cal.Rptr.2d 1, 928 P.2d 485.)

*Citing People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 73 Cal.Rptr. 550, 447 P.2d 942, appellant argues that a finding of premeditation and deliberation must be supported by evidence of a motive to kill, planning activity, or an exacting manner of killing. He acknowledges that his professed desire to end his relationship with Avie gave him some motive to kill her, but claims this circumstance was too "speculative" to itself support a first degree murder verdict. The factors enunciated in *Anderson* provide a framework for evaluating the evidence of premeditation on appeal, but they are neither necessary nor exclusive. (*People v. Pride* (1992) 3 Cal.4th 195, 247, 10 Cal.Rptr.2d 636, 833 P.2d 643.) In any event, an application of those factors tends to support, rather than refute, the first degree murder verdict in this case. Appellant's desire to end his relationship with Avie supplied a motive to kill, his retrieval of the gun from the garage was evidence of planning, and the number and placement of the shots fired "was entirely consistent with a preconceived design to take his victim's life." (*People v. Mayfield, supra,* 14 Cal.4th at p. 768, 60 Cal.Rptr.2d 1, 928 P.2d 485.) The evidence

of premeditation and deliberation was more than adequate to support the verdict of first degree murder.

The judgment is affirmed.

We concur: GILBERT, P.J. and PERREN, J.

152 P.3d 433

Supreme Court of California
The PEOPLE, Plaintiff and Respondent,
v.
Dwayne GILES, Defendant and Appellant.
**No. S129852.**

March 5, 2007.
Rehearing Denied May 23, 2007.

Marilyn G. Burkhardt, under appointment by the Supreme Court, West Los Angeles, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels, Kristofer Jorstad, Susan D. Martynec, Joseph P. Lee and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Nancy K.D. Lemon and Timna A. Sites, for California Partnership to End Domestic Violence as Amicus Curiae on behalf of Plaintiff and Respondent.

Douglas Beloof, Margaret Garvin, Kim Montagriff, Joanna Tucker Davis; Porter, Scott, Weiberg & Delehant and Laura J. Marabito, Sacramento, for National Crime Victim Law Institute as Amicus Curiae on behalf of Plaintiff and Respondent.

CHIN, J.

In this case, defendant admitted that he killed his ex-girlfriend, but claimed that the killing was committed in self-defense. Over defendant's objection,

the trial court admitted the victim's prior statements to a police officer who had been investigating a report of domestic violence involving defendant and the victim. The prior incident had occurred a few weeks before the killing. The victim related that, during that incident, defendant had held a knife to her and threatened to kill her.

Did defendant forfeit his right to confront his ex-girlfriend about the prior incident of domestic violence by killing her and thus making it impossible for her to be at the murder trial? Does the doctrine of "forfeiture by wrongdoing" apply where the alleged "wrongdoing" is the same as the offense for which defendant was on trial? Under that equitable doctrine, a defendant is deemed to have lost the right to object on confrontation grounds to the admission of out-of-court statements of a witness whose unavailability the defendant caused.

As explained below, we conclude that defendant forfeited his right to confront his ex-girlfriend when he killed her.

## FACTS[1]

### A. The shooting.

Defendant dated Brenda Avie for several years. On the night of September 29, 2002, he was staying

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[1] As the relevant facts are undisputed, they are taken directly from the Court of Appeal's opinion.

at his grandmother's house along with several other family members. Defendant was in the garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend, Tameta Munks, when defendant's grandmother called him into the house to take a telephone call from Avie. He returned to the garage and spoke to Munks, who then left.

Avie arrived at the house about 15 minutes later, after Munks had already left. She spoke with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard Avie and Banks leaving the garage together. A few minutes later, Smith heard defendant and Avie speaking to one another outside in a normal conversational tone. Avie then yelled "Granny" several times, and Smith heard a series of gunshots.

Smith and defendant's grandmother ran outside and discovered defendant holding a nine-millimeter handgun and standing about 11 feet from Avie, who was bleeding and lying on the ground. Defendant's grandmother took the gun from him and called 911. Smith drove defendant away from the house at his request, but he jumped out of her car and ran away after they had traveled several blocks. Defendant did not turn himself in to the police and was eventually arrested on October 15, 2002.

Avie had been shot six times in the area of her torso. Two of the wounds were fatal; one was consistent with her holding up her hand at the time she was shot; one was consistent with her having turned

to her side when she was shot; and one was consistent with her being shot while she was lying on the ground. Avie was not carrying a weapon when she was shot.

Defendant testified at trial and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie would get very jealous of other women, including Tameta Munks, whom he had been dating. Defendant knew that Avie had shot a man before she met him, and he had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions.

According to defendant, he had a "typical" argument with Avie when she called him on the telephone on the day of the shooting. He told her Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Defendant told Munks to leave because he was worried about the situation, and Avie arrived soon afterwards. Defendant told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later. Avie told defendant she knew Munks was returning and she was going to kill them both. Defendant stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and defendant, afraid she had something in her hand, fired several

shots. Defendant testified that it was dark and his eyes were closed as he was firing the gun. He claimed that he did not intend to kill her.

Marie Banks testified that she had seen defendant and Avie get into arguments before. Avie seemed angry when she came to defendant's grandmother's house on the day of the shooting, and she talked to defendant for about half an hour until defendant told everyone to leave. Avie and Banks left together, but as they were walking away they saw Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward defendant's grandmother's house and Banks went home. Banks did not see the shooting.

**B. The prior incident of domestic violence.**

On September 5, 2002, a few weeks before the shooting, Officer Stephen Kotsinadelis and his partner investigated a report of domestic violence involving defendant and Avie. Defendant answered the door, apparently agitated, and allowed them to enter. Avie was sitting on the bed, crying. Officer Kotsinadelis interviewed Avie while his partner spoke to defendant in a different room. Avie said she had been talking to a female friend on the telephone when defendant became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with defendant, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor,

but defendant climbed on top of her and punched her in the face and head. After Avie broke free again, defendant opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you." Officer Kotsinadelis saw no marks on Avie, but felt a bump on her head.

## RELEVANT PROCEDURAL HISTORY

The trial court admitted Avie's hearsay statements to Officer Kotsinadelis over defense counsel's objection. The court ruled that the statements were admissible under Evidence Code section 1370, which establishes a hearsay exception for out-of-court statements describing the infliction of physical injury on the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy.

The jury convicted defendant of first degree murder (Pen.Code, §§ 187, subd. (a), 189) and found that he had personally discharged a firearm causing great bodily injury or death.[2] (§ 12022.53, subd. (d).)

The Court of Appeal upheld admission of Avie's statements to the police. Applying the doctrine of forfeiture by wrongdoing, the Court of Appeal held that defendant "cannot be heard to complain that he was unable to cross-examine Avie about her prior, trustworthy statements to law enforcement when it

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[2] Unless otherwise stated, all statutory references are to the Penal Code.

was his own criminal violence that made her unavailable for cross-examination." It noted that, although the issue of forfeiture by wrongdoing was not litigated below, evidence of Avie's hearsay statements was admitted under a statutory hearsay exception that appeared to be valid at the time of defendant's pre-*Crawford* (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177) trial. Nevertheless, the court addressed the forfeiture issue because it was undisputed that Avie was unavailable to testify because of her death and that her death was the result of defendant's actions.

We granted defendant's petition for review to decide whether the Court of Appeal properly applied the forfeiture by wrongdoing doctrine.

## DISCUSSION

The confrontation clause of the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington, supra,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*Crawford*), the United States Supreme Court held that the confrontation clause (as envisioned by the Framers of the Constitution) bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford* overruled *Ohio v.*

*Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (*Roberts*), which for 24 years provided the framework governing the admissibility of statements from witnesses who did not testify at trial. (*Crawford, supra,* 541 U.S. at pp. 61-68, 124 S.Ct. 1354) *Roberts* had permitted the admission of hearsay statements of unavailable witnesses, without violating the confrontation clause, if those statements fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness. (*Roberts, supra,* 448 U.S. at p. 66, 100 S.Ct. 2531.) Holding that hearsay rules and judicial determinations of reliability no longer satisfied a defendant's confrontation right, *Crawford* announced: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra,* 541 U.S. at pp. 68-69, 124 S.Ct. 1354.)

Although *Crawford* dramatically departed from prior confrontation clause case law, it renounced only those exceptions to the confrontation clause that purported to assess the reliability of testimony (*Crawford, supra,* 541 U.S. at p. 62, 124 S.Ct. 1354.) The court noted that forfeiture by wrongdoing, an equitable principle, remains a valid exception to the confrontation clause: "[The *Roberts* test] is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims

on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. *See Reynolds v. United States,* 98 U.S. 145, 158-159, 25 L.Ed. 244 (1879)." (*Crawford, supra,* 541 U.S. at p. 62, 124 S.Ct. 1354.)

Here, there is no dispute that the victim's prior statements were testimonial in nature. (*See Davis v. Washington* (2006) ___ U.S. ___, 126 S.Ct. 2266, 2273-2274, 2278-2279, 165 L.Ed.2d 224 (*Davis*) [victim's statements to responding police officer during questioning were testimonial; "primary purpose" of questioning was to establish facts for later prosecution].)

Defendant acknowledges that the forfeiture by wrongdoing doctrine is an exception to the confrontation clause, but argues that it is inapplicable here because defendant did not kill the victim with the intent of preventing her testimony at a pending or potential trial. Rather, where as in this case, defendant killed the victim for unrelated personal reasons, the confrontation clause bars admission of the victim's prior testimonial statements. To answer defendant's claim, we first examine the development of the forfeiture by wrongdoing doctrine.

Although this court has not addressed the forfeiture by wrongdoing doctrine, federal and other state courts have affirmed its validity. The United States Supreme Court first applied the doctrine of forfeiture by wrongdoing in *Reynolds v. United States, supra,* 98 U.S. 145, 158-159 (*Reynolds*). In *Reynolds* (the only forfeiture case cited in *Crawford*), the defendant was

on trial for bigamy. When the court officer contacted Reynolds in an attempt to serve a subpoena on his second wife (who had previously testified about the bigamy offense in an earlier trial), Reynolds would not divulge her location and stated that his second wife would not appear at the trial. Over the defendant's confrontation clause objection, the trial court allowed the second wife's testimony from the defendant's earlier trial. (*Id.* at pp. 158-161.)

In applying the doctrine of forfeiture by wrongdoing, the court reasoned, "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the defendant's] own wrongful procurement, [the defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. . . . [I]f [a defendant] voluntarily keeps the witnesses away, he cannot insist on his [confrontation] privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." (*Reynolds, supra,* 98 U.S. at p. 158.) The court further explained, "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony." (*Id.* at p. 159.)

Notably, in describing the rule, the court did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act.[3] Applying that rule to the facts of the case, the court upheld the trial court's factual finding that Reynolds had kept his wife from testifying and ruled that the prior testimony was properly admitted. (*Reynolds, supra,* 98 U.S. at pp. 158-161.)

The high court recently affirmed the equitable nature of the forfeiture doctrine. In *Davis,* the court stated, "We reiterate what we said in *Crawford:* that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' 541 U.S., at 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*citing Reynolds,* 98 U.S., at 158-159, 25 L.Ed. 244). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis, supra,* 126 S.Ct. at p. 2280.)

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[3] *Reynolds* reviewed antecedent English common law cases (*Lord Morley's Case* (1666) 6 How. St. Tr. 770, *Harrison's Case* (1692) 12 How. St. Tr. 833, and *Regina v. Scaife* (Q.B.1851) 117 Eng. Rep. 1271) and early American antecedents of the forfeiture cases (*Drayton v. Wells* (1819) 10 S.C.L. (1 Nott & McC.) 409; *Williams v. The State* (1856) 19 Ga. 402). Although the facts therein involved witnesses and acts occurring after the witnesses had been deposed or had testified, those cases did not specifically address the intention of the defendants to prevent the witnesses' testimony at a pending trial. Instead, the focus was on whether there was adequate proof that the defendants caused the witnesses' absence.

Although the United States Supreme Court has cited *Reynolds* and addressed this doctrine infrequently, the lower federal courts began applying the forfeiture rule extensively in the context of witness tampering cases.[4] Starting in the 1960's and 1970's, the federal government placed greater emphasis on the prosecution of organized crime and drug activity; as many of these prosecutions involved reluctant witnesses who experienced great pressure not to testify, forfeiture by wrongdoing became more central to prosecution efforts. (King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions* (2006) 39 Creighton L.Rev. 441, 452-453.)

*United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, was the first modern federal circuit court case to use the defendant's wrongdoing against a witness to resolve a confrontation clause issue. There, the witness purchased drugs from the defendant, but before trial refused to testify despite having been granted immunity. The witness related that he feared reprisals, but only indirectly implicated the defendant in

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[4] Between *Reynolds* and *Crawford,* the United States Supreme Court cited *Reynolds* infrequently and generally in the context of the admission of an unavailable witness's prior sworn testimony at a proceeding which the defendant had attended. (*See Diaz v. United States* (1912) 223 U.S. 442, 452, 32 S.Ct. 250, 56 L.Ed. 500; *West v. Louisiana* (1904) 194 U.S. 258, 265, 24 S.Ct. 650, 48 L.Ed. 965; *Motes v. United States* (1900) 178 U.S. 458, 471-472, 20 S.Ct. 993, 44 L.Ed. 1150; *Mattox v. United States* (1895) 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409.)

the threats. (*Id.* at pp. 1352-1353.) The court held that the defendant, by intimidating the witness into not testifying and causing the witness's unavailability at trial, was barred from raising a confrontation clause objection to the admission of the witness's grand jury testimony. (*Id.* at pp. 1358-1359.)

Other federal cases involved witness tampering where a defendant murdered or participated in the murders of a witness (*see, e.g., United States v. Dhinsa* (2d Cir. 2001) 243 F.3d 635, 650-654; *United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 813, 820; *United States v. Emery* (8th Cir. 1999) 186 F.3d 921, 925; *United States v. White* (D.C.Cir. 1997) 116 F.3d 903, 911-912; *United States v. Mastrangelo* (2d Cir. 1982) 693 F.2d 269, 271-273; *United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 630) or threatened a witness. (*See, e.g., United States v. Balano* (10th Cir. 1979) 618 F.2d 624, 628-629; *United States v. Carlson, supra,* 547 F.2d at p. 1353.) In the federal cases, the courts applied the forfeiture by wrongdoing doctrine where the defendant, by a wrongful act, was involved in or responsible for procuring the unavailability of a hearsay declarant, and did so, at least in part, with the intention of making the declarant unavailable as an actual or potential witness against the defendant. (*United States v. Dhinsa, supra,* 243 F.3d at pp. 653-654; *United States v. Emery, supra,* 186 F.3d at pp. 925-927; *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1279-1280; *Steele v. Taylor* (6th Cir. 1982) 684 F.2d 1193, 1198-1199, 1202; *United States v. Thevis, supra,* 665 F.2d at p. 630;

*United States v. Balano, supra,* 618 F.2d at pp. 628-629.) In many of these cases, it was held that the defendants were barred from objecting under both the rule against hearsay and the confrontation clause. (*See, e.g., United States v. Carlson, supra,* 547 F.2d at pp. 1353-1355; *United States v. White, supra,* 116 F.3d at pp. 912-913; *United States v. Mastrangelo, supra,* 693 F.2d at p. 272.)

The forfeiture by wrongdoing doctrine, as articulated by the lower federal courts, was codified with regard to federal hearsay rules in 1997 with the adoption of Federal Rules of Evidence, rule 804(b)(6) (28 U.S.C.). (*United States v. Scott* (7th Cir. 2002) 284 F.3d 758, 762.) That rule states, "Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [¶] . . . [¶] (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." (Fed. Rules Evid., rule 804(b)(6), 28 U.S.C.) The text of the rule was based on *United States v. Thevis,* which identified two elements: "(1) the defendant caused the witness's unavailability (2) for the purpose of preventing that witness from testifying at trial." (*United States v. Thevis, supra,* 665 F.2d at p. 633, fn. 17; *see* Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)* (2003) 51 Drake L.Rev. 459, 477.) The adoption of a specific intent requirement

limited the federal hearsay rule to witness tampering cases. (*Ibid.*)

A similar pre-*Crawford* development of the forfeiture by wrongdoing rule occurred in the states. As with the federal courts, the state courts generally applied the rule when the defendant intended to, and did, tamper with an actual or potential witness to prevent the witness from cooperating with the authorities or testifying at trial. (*See, e.g., State v. Valencia* (Ct.App. 1996) 186 Ariz. 493, 924 P.2d 497, 499-503; *State v. Henry* (2003) 76 Conn.App. 515, 820 A.2d 1076, 1087-1088; *Devonshire v. United States* (D.C. 1997) 691 A.2d 165, 166; *State v. Hallum* (Iowa 2000) 606 N.W.2d 351, 358; *State v. Gettings* (1989) 244 Kan. 236, 769 P.2d 25, 27-29; *State v. Magouirk* (La.Ct.App. 1988) 539 So.2d 50, 64-66; *State v. Black* (Minn. 1980) 291 N.W.2d 208, 213-214; *State v. Sheppard* (Law Div. 1984) 197 N.J.Super. 411, 484 A.2d 1330, 1345-1348; *Holtzman v. Hellenbrand* (1983) 92 A.D.2d 405, 460 N.Y.S.2d 591, 597.)

*Crawford* reshaped the confrontation landscape: testimonial evidence that previously had been admitted under "firmly rooted" hearsay exceptions, or that met comparable reliability standards, became inadmissible unless the defendant had the opportunity to cross-examine the witness. (*Crawford, supra,* 541 U.S. at pp. 60-61, 68, 124 S.Ct. 1354.) Previously, the primary purpose of the confrontation clause was only to prevent the introduction of unreliable hearsay that fell outside a firmly rooted hearsay exception and that did not otherwise satisfy comparable reliability

standards. (*Roberts, supra,* 448 U.S. at p. 66, 100 S.Ct. 2531.) After *Crawford,* the response of many courts (including the Court of Appeal in this case) was to focus on the equitable forfeiture rationale which could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases.

*State v. Meeks* (2004) 277 Kan. 609, 88 P.3d 789 (*Meeks*) was the first post-*Crawford* case. There, the defendant shot James Green, the victim, during an argument and fistfight. About 10 minutes after the shooting, Green identified the defendant as the shooter to an officer at the scene, but died soon thereafter. During trial, the prosecution introduced Green's statement identifying the defendant to the police. Although the court noted that the victim's response to the officer's question was arguably testimonial, *Meeks* found it unnecessary to decide that issue. Instead, it held that the defendant "forfeited his right to confrontation by killing the witness, Green." (*Meeks, supra,* 88 P.3d at pp. 793-794.) Noting that the high court in *Crawford* "continued to accept the [*Reynolds*] rule of forfeiture by wrongdoing which 'extinguishes confrontation claims on essentially equitable grounds,'" *Meeks* relied on the reasoning set forth in *Reynolds* that "'if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.'" (*Meeks, supra,* 88 P.3d at p. 794.)

In *United States v. Mayhew* (S.D.Ohio 2005) 380 F.Supp.2d 961 (*Mayhew*), the court applied the forfeiture by wrongdoing doctrine to facts similar to those in *Meeks*. In *Mayhew*, the defendant kidnapped and shot the victim. While the victim was in the ambulance, a police officer interviewed her. The victim related that the defendant had earlier killed her mother and her mother's fiancé, and identified the defendant as her kidnapper and shooter. The victim died soon thereafter at the hospital. (*Id.* at pp. 963, 965.) The federal district court in *Mayhew* ruled that the victim's statements were testimonial in nature, but admissible. (*Id.* at pp. 965-966.) Relying on *Crawford's* discussion of the equitable principles underlying the forfeiture doctrine, it reasoned that, "Defendant, in making the witness unavailable for testimony, forfeited his rights under the confrontation clause by his own wrongdoing. As the Sixth Circuit Court of Appeals has held, 'a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness.' [*United States v.*] *Cromer* [(6th Cir. 2004)] 389 F.3d [662,] 679 (*citing* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo.L.J. 1011, 1031 (1998))." (*Mayhew, supra*, 380 F.Supp.2d at p. 966.)

In *United States v. Garcia-Meza* (6th Cir. 2005) 403 F.3d 364 (*Garcia-Meza*), a case very similar to this one, the defendant admitted that he was responsible for his wife's death, but claimed that he was not guilty of first degree murder because he was too

intoxicated to have premeditated the killing. (*Id.* at pp. 367-368.) The prosecution introduced evidence of a prior incident during which police officers responded to a call about an assault. When the officers arrived, they found the defendant's wife very upset and in pain with numerous cuts and bruises on her body. The wife told the officers that the defendant had repeatedly punched her and threatened to kill her because she had talked to a former boyfriend earlier in the day. The district court admitted the assault evidence to establish motive, intent, and capacity to commit murder. (*Ibid.*)

Although not deciding whether the wife's statements to the officers were testimonial, the Sixth Circuit Court of Appeals upheld the admission of the statements. Relying on the equitable principles outlined in *Crawford* and *Reynolds,* the court reasoned, "[D]efendant admitted that he killed [his wife], thereby procuring her unavailability to testify. The dispute at trial concerned not whether he was the one to stab her, but whether he acted with premeditation to support a conviction of first degree murder. Under these circumstances, there is no doubt that the Defendant is responsible for Kathleen's unavailability. Accordingly, he has forfeited his right to confront her." (*Garcia-Meza, supra,* 403 F.3d at p. 370.)

Similarly, in *People v. Moore* (Colo.Ct.App. 2004) 117 P.3d 1 (*Moore*), a murder case, the Colorado Court of Appeals upheld the admission of the defendant's wife's out-of-court statement implicating the defendant in a prior instance of domestic violence. Citing to

*Crawford's* approval of forfeiture by wrongdoing, the court reasoned that, because there was no dispute that the victim was unavailable to testify because of her death and that her death was the result of the defendant's actions, the defendant should not benefit from his wrongdoing. (*Moore, supra,* 117 P.3d at p. 5.) Thus, he forfeited his right to claim a confrontation violation in connection with the admission of the victim's statements into evidence. (*Ibid.*)

In short, *Meeks* and *Mayhew* involved out-of-court statements relating to the charged offense itself. *Garcia-Meza* and *Moore* involved extrajudicial statements relating to a prior incident, similar to this case. Significantly, the courts in these cases applied the forfeiture by wrongdoing doctrine although there was no indication the defendants killed the victims with the intent of preventing testimony at a future trial. (*See also People v. Bauder* (*Bauder*) (2005) 269 Mich.App. 174, 712 N.W.2d 506, 514-515.)

Defendant contends that courts have traditionally applied the forfeiture doctrine only in the context of witness tampering cases, and that the federal rules have codified this approach. Thus, according to defendant, the Court of Appeal in this case and the above post-*Crawford* cases improperly expanded the doctrine by eliminating an intent-to-prevent-testimony requirement.

In fact, courts have disagreed over this requirement. Some state and federal courts have stated that the intent-to-silence requirement is only mandated by

the federal rules and not by the Constitution. (*See, e.g., Garcia-Meza, supra,* 403 F.3d at p. 370 ["Though the Federal Rules of Evidence may contain [the intent-to-silence] requirement, *see* Fed.R.Evid. 804(b)(6), the right secured by the Sixth Amendment does not. . . ."]; *United States v. Miller* (1997) 116 F.3d 641, 668 ["Although a 'finding that [defendants'] purpose was to prevent [a declarant from] testifying,' [citation], is relevant, such a finding is not required"]; *Bauder, supra,* 712 N.W.2d at pp. 514-515 [agreeing with *Garcia-Meza*]; *Gonzalez v. State* (Tex.Crim.App. 2004) 155 S.W.3d 603, 611 [stating that while some courts have adopted the intent-to-silence requirement, "we see no reason why the [forfeiture] doctrine should be limited to such cases"].) The Sixth Circuit Court of Appeals explained: "There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. . . . The Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit." (*Garcia-Meza, supra,* 403 F.3d at pp. 370-371.) Similarly, the Court of Appeal here stated, "we

see no reason why the [forfeiture] doctrine should be limited to [intent-to-silence] cases."

Other courts have stated that the intent-to-silence requirement is an element of their forfeiture by wrongdoing doctrines, although stopping short of holding that the intent requirement is constitutionally compelled. (*See, e.g., United States v. Houlihan, supra,* 92 F.3d at p. 1280; *United States v. Thevis, supra,* 665 F.2d at p. 633, fn. 17; *State v. Romero* (2006) 139 N.M. 386, 133 P.3d 842, 850-855; *Commonwealth v. Edwards* (2005) 444 Mass. 526, 830 N.E.2d 158, 170; *People v. Maher* (1997) 89 N.Y.2d 456, 654 N.Y.S.2d 1004, 677 N.E.2d 728, 730-731; *but see State v. Alvarez-Lopez* (2004) 136 N.M. 309, 98 P.3d 699, 704-705.)

Defendant's argument relating to the intent requirement rests on the premise that the forfeiture by wrongdoing doctrine is, in essence, not based on broad forfeiture principles, but instead on waiver principles. Defendant points out that some cases have referred to the rule as the waiver by wrongdoing doctrine. (*See, e.g., United States v. Cherry, supra,* 217 F.3d at p. 815; *United States v. Houlihan, supra,* 92 F.3d at pp. 1278-1279; *United States v. Aguiar* (2nd Cir. 1992) 975 F.2d 45, 47; *United States v. Thevis, supra,* 665 F.2d at p. 630; *but see Steele v. Taylor, supra,* 684 F.2d at p. 1201, fn. 8 [waiver concept is legal fiction; defendant "simply does a wrongful act that has legal consequences that he may or may not foresee"].) The underlying premise of those cases is that a defendant who intentionally prevents an

actual or potential witness from testifying at a trial knows that the witness is no longer available and cannot be cross-examined, and thus, has impliedly, if not expressly, waived his confrontation rights by his misconduct. (*Thevis, supra,* 665 F.2d at p. 630.)

However, the United States Supreme Court has characterized the rule in question as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. (*Crawford, supra,* 541 U.S. at p. 62, 124 S.Ct. 1354.) Although applied to the facts of a witness tampering case, *Reynolds* described the rule without reference to a defendant's motivation. (*Reynolds, supra,* 98 U.S. at p. 158 ["If, therefore, when absent by [a defendant's wrongful] procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated"].) The rule, as enunciated by the high court, is based on two broad equitable principles: (1) "[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong"; and (2) "but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." (*Reynolds, supra,* 98 U.S. at pp. 159, 158.) Thus, wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule.

As in *Reynolds,* many courts applying the rule (even in the context of witness tampering cases), emphasize the equitable aspects of the rule rather than the defendant's underlying motives in procuring

the witness's absence. (*See, e.g., United States v. Thompson* (7th Cir. 2002) 286 F.3d 950, 962, *quoting United States v. White, supra,* 116 F.3d at p. 911 ["'defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him'"]; *United States v. Emery, supra,* 186 F.3d at p. 926 ["defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness"]; *United States v. Rouco* (11th Cir. 1985) 765 F.2d 983, 995 [defendant "waived his right to cross-examine [the victim] by killing him. 'The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery'"]; *United States v. Mayes* (6th Cir. 1975) 512 F.2d 637, 651 [defendant "cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial"]; *Steele v. Taylor, supra,* 684 F.2d at p. 1202 ["defendant cannot prefer the law's preference [for live testimony over hearsay] and profit from it . . . while repudiating that preference by creating the condition that prevents it"].)

Thus, it appears that the intent-to-silence element required by some cases evolved from the erroneous characterization of the forfeiture doctrine as the waiver by misconduct doctrine. Because a waiver is an intelligent relinquishment of a known right, the intent-to-silence element was added to establish the defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished

the right to cross-examine that witness. (*See United States v. Houlihan, supra,* 92 F.3d at pp. 1279-1280.) But, "[t]he Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive." (*Garcia-Meza, supra,* 403 F.3d at p. 370.)

Although some courts have used the terms "waiver" and "forfeiture" interchangeably, the high court, in a pre-*Crawford* case, has explained that they are quite different. (*United States v. Olano* (1993) 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508, *citing Freytag v. Commissioner* (1991) 501 U.S. 868, 894-895, fn. 2, 111 S.Ct. 2631, 115 L.Ed.2d 764 (conc. opn. of Scalia, J.) ["[t]he two are really not the same."].) "Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' [citation], *is merely one means by which a forfeiture may occur.* Some rights may be forfeited by means short of waiver, [citations]." (*Freytag v. Commissioner, supra,* 501 U.S. at pp. 894-895, fn. 2, 111 S.Ct. 2631 (conc. opn. of Scalia, J.), italics added.) Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from

his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable."[5]

Here, there were no eyewitnesses to the fatal shooting; defendant and the victim were the only ones present. Defendant testified at trial and admitted shooting the victim, but claimed he had acted in self-defense. He claimed that the victim was very jealous of other women, and was a violent person who had previously shot a man, threatened people with knives, and vandalized his home and car on two separate occasions. When describing some of these prior acts, defendant repeated statements allegedly

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[5] Defendant argues that language in *Davis* regarding the forfeiture by wrongdoing doctrine – "when defendants *seek* to undermine the judicial process by procuring or coercing silence from witnesses and victims" – supports his claim that an intent-to-silence requirement is constitutionally compelled. (*Davis, supra,* 126 S.Ct. at p. 2280, italics added.) However, that language only describes the traditional form of witness tampering cases – in the context of the domestic violence cases therein where the victims did not testify at trial – without limiting the forfeiture doctrine to witness tampering cases. More important, *Davis* reaffirmed the equitable nature of the forfeiture by wrongdoing doctrine and declared that *Crawford,* in overruling *Roberts, supra,* 448 U.S. 56, 100 S.Ct. 2531, did not destroy the ability of courts to protect the integrity of their proceedings. (*Davis, supra,* 126 S.Ct. at p. 2280.)

made by the victim. Defendant testified that the victim told him she had shot a man during an argument. He further testified that, during two prior aggravated assaults, the victim declared that she wanted to "check that bitch" on one occasion, while on the other she asserted that she wanted "to kill that bitch."

In relating his version of the fatal events in this case, defendant again repeated statements allegedly made by the victim. He testified that they had had a "typical" argument earlier that day. The victim knew defendant was with his new girlfriend, and said she was on her way there to kill her. When she arrived, she threatened to kill both defendant and "that bitch." Afraid she had something in her hand, defendant shot at her several times after she "charged" him. Thus, partially through the victim's own alleged statements, defendant portrayed her as a violent, aggressive, foulmouthed, jealous, and volatile person.

Defendant now argues that admission of the victim's extrajudicial statements to the police, which conflicted with his portrayal of the victim as the aggressor, violated his confrontation rights. Defendant should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements. "A defendant cannot prefer the law's preference [for live testimony over hearsay] and profit from it . . . while repudiating that preference by

creating the condition that prevents it." (*Steele v. Taylor, supra,* 684 F.2d at p. 1202.)

"The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to [the forfeiture by wrongdoing] doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford,* in overruling *Roberts,* did not destroy the ability of courts to protect the integrity of their proceedings." (*Davis, supra,* 126 S.Ct. at p. 2280.) Accordingly, we conclude that, to protect the integrity of their proceedings, post-*Crawford* courts (including the Court of Appeal in this case) have correctly applied the forfeiture doctrine in a necessary, equitable manner. That is, courts should be able to further the truth-seeking function of the adversary process when necessary, allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony. (*See Steele v. Taylor, supra,* 684 F.2d at p. 1201 ["the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act"].)

We must also decide whether the doctrine of forfeiture by wrongdoing applies where the alleged wrongdoing is the same as the offense for which defendant was on trial. In other words, defendant was on trial for the same wrongdoing (murder) that caused the forfeiture of his right to confront the

victim. Because the two acts are the same, the court's forfeiture finding (as a predicate evidentiary matter) depends on determining that defendant committed the charged criminal act.

In the classic witness tampering cases, the defendant is not on trial for the same wrongdoing that caused the forfeiture of his confrontation right, but rather for a prior underlying crime about which the victim was about to testify. (*See, e.g., United States v. Balano, supra,* 618 F.2d at pp. 625-626; *United States v. Carlson, supra,* 547 F.2d at pp. 1352-1353.) However, even in the context of witness tampering, courts have applied forfeiture where the defendant was charged with the same homicide that rendered the witness unavailable. (*See, e.g., United States v. Dhinsa, supra,* 243 F.3d at pp. 642-644, 650; *United States v. Emery, supra,* 186 F.3d at p. 926; *United States v. White, supra,* 116 F.3d at pp. 909-910; *United States v. Houlihan, supra,* 92 F.3d at pp. 1278-1281; *United States v. Rouco, supra,* 765 F.2d at pp. 993-995; *United States v. Thevis, supra,* 665 F.2d at pp. 627-633; *but see United States v. Lentz* (E.D.Va. 2002) 282 F.Supp.2d 399, 426-427 [rejecting application of forfeiture rule in murder trial where murder was done to procure witness's unavailability in divorce proceeding].)

The argument against permitting a judicial preliminary determination of forfeiture is that in ruling on the evidentiary matter, a trial court is required, in essence, to make the same determination of guilt of the charged crime as the jury. (*United*

*States v. Lentz, supra,* 282 F.Supp.2d at p. 426 [forfeiture rule violates presumption of innocence and right to jury trial].) In responding to that argument, courts have found analogous the procedures for admitting coconspirator statements against a defendant who is charged with conspiracy; the trial court makes a preliminary finding of conspiracy that is proven by a preponderance of the evidence. (*See, e.g., United States v. Emery, supra,* 186 F.3d at pp. 926-927; *United States v. White, supra,* 116 F.3d at p. 912; *United States v. Houlihan, supra,* 92 F.3d at p. 1280; *cf. Bourjaily v. United States* (1987) 483 U.S. 171, 175-176, 107 S.Ct. 2775, 97 L.Ed.2d 144 [approval of trial court's predicate finding that conspiracy existed even when one of the underlying crimes before the jury was the existence of the same conspiracy].) The presumption of innocence and right to jury trial will not be infringed because the jury "will never learn of the judge's preliminary finding" and "will use different information and a different standard of proof to decide the defendant's guilt." (*Mayhew, supra,* 380 F.Supp.2d at p. 968; fn. omitted.) Recognizing that the courts have generally applied the forfeiture by wrongdoing doctrine even where the alleged wrongdoing is the same as the charged offense, defendant no longer disputes that the forfeiture doctrine can apply under these circumstances. We see no reason to adopt a different rule.

Regarding the applicable standard of proof, the Court of Appeal's initial opinion held that the facts supporting the application of the forfeiture by wrongdoing doctrine must be proven to a trial court by clear

and convincing evidence. After the Attorney General filed a petition for rehearing in which he argued that the appropriate standard is proof by a preponderance of the evidence, the court left "the issue of the appropriate burden of proof for another day" on the ground there was sufficient evidence of forfeiture under either standard. We agree with the Attorney General that, because the issue is "fairly included in" the issues on which we granted review (Cal. Rules of Court, rule 8.516(b)(1)), we should decide it to provide guidance to the trial courts.

The majority of the lower federal courts have held that the applicable standard necessary for the prosecutor to demonstrate forfeiture by wrongdoing is by a preponderance of the evidence. (*See, e.g., United States v. Cherry, supra,* 217 F.3d at p. 820; *United States v. Thai* (2nd Cir. 1994) 29 F.3d 785, 814; *United States v. Mastrangelo, supra,* 693 F.2d at p. 273; *Steele v. Taylor, supra,* 684 F.2d at pp. 1202-1203; *United States v. Balano, supra,* 618 F.2d at p. 629; *Mayhew, supra,* 380 F.Supp.2d at p. 968; *but see United States v. Thevis, supra,* 665 F.2d at p. 631 [requiring clear and convincing evidence].) Many of the federal courts have found that the forfeiture finding is the functional equivalent of the predicate factual findings that a court must make in ruling on the admissibility of extrajudicial statements under the coconspirator exception, which need only be

proved by a preponderance of the evidence.[6] (*See e.g., United States v. Emery, supra,* 186 F.3d at pp. 926-927; *United States v. White, supra,* 116 F.3d at p. 912; *United States v. Houlihan, supra,* 92 F.3d at p. 1280; *Steele v. Taylor, supra,* 684 F.2d at pp. 1202-1203; *see also Commonwealth v. Edwards, supra,* 830 N.E.2d at pp. 172-173; *Commonwealth v. Morgan* (2005) 69 Va.Cir. 228, 232.) One court based its decision regarding the preponderance standard on *Reynolds* itself. (*Steele v. Taylor, supra,* 684 F.2d at p. 1202, *citing Reynolds, supra,* 98 U.S. at p. 160 ["'enough had been shown [by the government] to cast the burden of proof on him [the defendant] of showing that he had not been instrumental in concealing or keeping the witness away.'"]; *see West v. Louisiana, supra,* 194 U.S. at p. 265, 24 S.Ct. 650 [*Reynolds* "held that when there was *some* proof that an absent witness was kept away by procurement of the defendant the burden of

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[6] *Bourjaily v. United States, supra,* 483 U.S. at pages 175-176, 107 S.Ct. 2775, held that under the Federal Rules of Evidence, the government need only prove its threshold burden by a preponderance of the evidence when establishing the predicate facts relating to the admissibility of coconspirator statements. Although *Bourjaily* does not expressly consider the standard of proof on a confrontation clause claim, the discussion relies on constitutional cases in selecting the preponderance standard (*e.g., United States v. Matlock* (1974) 415 U.S. 164, 177-178, 94 S.Ct. 988, 39 L.Ed.2d 242 [voluntariness of consent to search must be shown by preponderance of the evidence]; *Lego v. Twomey* (1972) 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 [voluntariness of confession must be demonstrated by a preponderance of the evidence]). (*Bourjaily v. United States, supra,* 483 U.S. at p. 176, 107 S.Ct. 2775.)

proof was on him to show . . . that he was not instrumental in concealing or keeping the witness away," italics added].)

Some federal courts do not even require a judicial preliminary determination of forfeiture; instead they allow the hearsay statement to be admitted at trial contingent on proof that the defendant wrongfully procured the unavailability of the declarant by a preponderance of the evidence. (*See, e.g., United States v. Emery, supra,* 186 F.3d at p. 926; *United States v. White, supra,* 116 F.3d at pp. 914-915; *United States v. Houlihan, supra* 92 F.3d at p. 1281, fn. 5.) Moreover, if a hearing on forfeiture is required, federal courts generally permit the prosecution to rely on the challenged hearsay evidence when proving forfeiture. (*See, e.g., United States v. White, supra,* 116 F.3d at p. 914 [leaving "for another day the issue of whether a forfeiture finding could rest *solely* on hearsay"]; *United States v. Houlihan, supra,* 92 F.3d at p. 1281; *United States v. Mastrangelo, supra,* 693 F.2d at p. 273; *see also United States v. Emery, supra,* 186 F.3d at p. 927 ["inclined to doubt" that wrongful procurement must be proven independently of the challenged hearsay]; *Commonwealth v. Edwards, supra,* 830 N.E.2d at p. 174.)[7] We thus agree that "[a]

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[7] *Davis, supra,* 126 S.Ct. at page 2280, noted that federal and state courts have generally held the government to the preponderance of evidence standard to demonstrate forfeiture. Further, although noting that *Commonwealth v. Edwards, supra,* 830 N.E.2d at page 174, permitted the trial court's consideration of the unavailable witness's out-of-court statements at a

(Continued on following page)

standard that requires the proponent to show that it is more probable than not that the defendant procured the unavailability of the witness is constitutionally sufficient under the . . . confrontation clause[ ]." (*Steele v. Taylor, supra,* 684 F.2d at p. 1202.)[8]

The application of the rule should be subject to several limitations. First, the witness should be genuinely unavailable to testify and the unavailability for cross-examination should be caused by the defendant's intentional criminal act. Second, a trial

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hearing on forfeiture, it took "no position on the standards necessary to demonstrate . . . forfeiture." (*Davis, supra,* 126 S.Ct. p. 2280.)

[8] Defendant argues that proof of forfeiture must be established by clear and convincing evidence. He points to Evidence Code section 1350, which establishes an independent, narrow hearsay exception in serious felony cases, based on forfeiture by wrongdoing principles. An unavailable witness's out-of-court statements is admissible when there is "clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant." (Evid.Code, § 1350, subd. (a)(1).) However, the Legislature, in establishing more stringent standards, is not the final arbiter of constitutional standards. (*See Jones v. Superior Court* (1970) 3 Cal.3d 734, 740, 91 Cal.Rptr. 578, 478 P.2d 10.) We further note that section 1350, setting forth a higher statutory standard of proof, survives California Constitution article I, section 28, subdivision (d) (Proposition 8) because it was enacted by a two-thirds vote of the membership in each house of the Legislature. (*See People v. Markham* (1989) 49 Cal.3d 63, 260 Cal.Rptr. 273, 775 P.2d 1042.)

court cannot make a forfeiture finding based solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding.

The forfeiture by wrongdoing doctrine, as adopted by us, only bars a defendant's objection under the confrontation clause of the federal Constitution and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect. (Evid.Code, § 352.) Finally, the jury should not be advised of the trial court's underlying finding that defendant committed an intentional criminal act so that the jury will draw no inference about the ultimate issue of guilt based on the evidentiary ruling itself.

Here, the Court of Appeal correctly found that there was clear and convincing evidence that defendant procured the victim's unavailability through criminal conduct – a criminal homicide. A fortiori, the preponderance of the evidence standard was also met. Defendant retrieved a loaded gun from inside the garage after the victim returned to the house. Preparing to fire the gun, he disengaged its safety and then shot her six times in her torso. Two of those wounds were fatal; one was consistent with her holding up

her hand at the time she was shot; one was consistent with her having turned to her side when she was shot; and one was consistent with her being shot while she was lying on the ground. One of the investigating officers testified that a semiautomatic firearm such as the one used by defendant fires only once each time the trigger is pulled, supporting an inference that defendant had pulled the trigger for each shot. In contrast, the victim was not carrying a weapon when she was shot. Immediately after the shooting, defendant fled the scene and did not turn himself in to the police.

The above independent evidence, considered with the victim's prior statements, supports the Court of Appeal's conclusion that defendant did not shoot in self-defense, and instead committed an unlawful homicide that caused the victim's unavailability to testify at trial. As noted by the Court of Appeal, "the evidence supporting this [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable." Thus, defendant has forfeited his confrontation clause challenge to the victim's prior out-of-court statements to the police.

## CONCLUSION

We conclude that the Court of Appeal's judgment should be affirmed.

GEORGE, C.J., KENNARD, BAXTER, and CORRIGAN, JJ., concur. Concurring Opinion by WERDEGAR, J.

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I concur in the judgment of affirmance. Like the majority, I conclude the doctrine of forfeiture by wrongdoing is not confined exclusively to witness-tampering cases, in which a defendant commits malfeasance in order to procure the unavailability of a witness, but can be applied to these facts as well, where the defendant's actions in procuring a witness's unavailability were the same actions for which he stood trial.

That narrow conclusion is enough to dispose of this case. As the majority acknowledges, the evidence available independent of victim Brenda Avie's statements demonstrated clearly and convincingly that defendant Dwayne Giles shot and killed her and was not acting in self-defense. (Maj. opn., *ante,* 55 Cal.Rptr.3d at p. 149, 152 P.3d at p. 447.) Because of this intentional criminal misconduct, Giles forfeited his constitutional confrontation clause objection to the admission of Avie's statements at trial. As the majority further correctly notes, this conclusion does not affect any statutory Evidence Code objections.

(*Id.*, 55 Cal.Rptr.3d at p. 148, 152 P.3d at p. 446.) That should be the end of the matter.

Nevertheless, the majority proceeds to address and resolve two subsidiary questions unnecessary to this case's disposition. First, it decides whether the prosecution, in order to use the victim's hearsay statements, must demonstrate the defendant's wrongdoing by clear and convincing evidence or only a preponderance of the evidence, despite its implicit acknowledgement the issue is not implicated here because either standard was satisfied. Second, it decides whether and to what extent the victim's challenged statements may be used in making this threshold showing of wrongdoing, despite the fact, again, the evidence available independent of Avie's statements makes it unnecessary to speak to this point.

Although as a general matter I endorse the majority's desire to offer guidance to the trial courts, here the procedural posture of the case and the substantive nature of the issues make reaching out to do so both unnecessary and unwise.

Procedurally, these issues were never addressed by either court below, not by the trial court, because Giles's trial predated *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, which revised the standards for determining when the confrontation clause prohibits admission of testimonial hearsay, and not by the Court of Appeal, because it recognized, correctly, that either standard was met

here. The Court of Appeal, moreover, never discussed whether it arrived at this conclusion exclusively based on, partially based on, or entirely without reliance on Avie's statements. Our grant of review limited issues and focused on whether forfeiture by wrongdoing could be applied when the wrongdoing was identical to the offense for which the defendant stood trial. Given that limitation, the parties in their briefing touched only in passing on the standard of proof question and discussed the second question not at all. Thus, even were there compelling reasons to reach out and address issues unnecessary to this case's disposition, this record would provide a notably poor basis for doing so.

Were the issues at stake routine, the absence of any considered views from the parties or lower courts, in a case where the issues are immaterial to the case's disposition, would mean less. Substantively, however, they are not routine. The questions of the appropriate standard of proof and the appropriate evidentiary basis for finding forfeiture of a constitutional right are questions of constitutional dimension. Proposition 8's "Truth-in-Evidence" provisions require admission of evidence except to the extent existing statutory or constitutional rules or privileges require otherwise. (Cal. Const., art. I, § 28, subd. (d).) Thus, to decide the subsidiary questions the majority purports to resolve, we must examine the confrontation clause of the United States Constitution, and perhaps the due process clause as well, and determine what they require.

In lieu of serious constitutional analysis, however, the majority simply notes that most-but not all-lower federal courts to consider the question have settled on a preponderance of the evidence standard, and proceeds to join in that view. (Maj. opn., *ante,* 55 Cal.Rptr.3d at pp. 147-48, 152 P.3d at pp. 445-46.) That majority federal view might well be right, but it might also be wrong, especially given that the federal cases the majority relies upon uniformly antedate the United States Supreme Court's recent reassertion of the breadth and importance of the confrontation clause in ensuring defendants their fair trials. (*Crawford v. Washington, supra,* 541 U.S. at pp. 68-69, 124 S.Ct. 1354 ["Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation"];[1] *see also United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 631 [even pre-*Crawford,* holding "because confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth . . . , we conclude that the trial court was correct in requiring clear and convincing evidence of a waiver of this right"]; *People v. Geraci* (1995) 85 N.Y.2d 359, 625

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[1] While *Crawford* accepted that forfeiture by wrongdoing could, when proven, extinguish confrontation clause rights, neither it nor the United States Supreme Court's follow-up decision in *Davis v. Washington* have purported to resolve what showing will suffice to establish a forfeiture. (*See Davis v. Washington* (2006) ___ U.S. ___, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224; *Crawford v. Washington, supra,* 541 U.S. at p. 62, 124 S.Ct. 1354.)

N.Y.S.2d 469, 649 N.E.2d 817, 822 [concluding clear and convincing evidence is required because forfeiture results in "loss of the valued Sixth Amendment confrontation right" and because of "the intimate association between the right to confrontation and the accuracy of the fact-finding process"].)[2]

Constitutional analysis should not be embarked on lightly and never when a case's resolution does not demand it. As then Associate Justice George once explained in like circumstances: "[T]he majority's approach is inconsistent with well-established principles of judicial restraint. In his celebrated concurring opinion in *Ashwander v. Valley Authority* (1936) 297 U.S. 288, 347[, 56 S.Ct. 466, 80 L.Ed. 688], Justice Brandeis, in reviewing a number of settled precepts of judicial practice, observed that '[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. [Citations.]' California courts have long subscribed to this principle.

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[2] The issue of what evidentiary basis may support a showing of forfeiture of the constitutional right to confront and cross-examine the speaker by wrongdoing – May the prosecution rely solely, or even in part, on the very unconfronted statements it seeks to admit? May the trial court, without the opportunity for confrontation, make reliability determinations concerning these statements? – is likewise a constitutional question of uncertain resolution.

(*See, e.g., Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 66[, 195 P.2d 1] ["'It is a well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.'"]; *People v. Barton* (1963) 216 Cal.App.2d 542, 546[, 31 Cal.Rptr. 7].) (*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 17, 2 Cal.Rptr.2d 490, 820 P.2d 1000 (conc. opn. of George, J.); *see also Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 332, 342, 42 Cal.Rptr.3d 47, 132 P.3d 249; *People v. McKay* (2002) 27 Cal.4th 601, 626-627, 117 Cal.Rptr.2d 236, 41 P.3d 59 (conc. opn. of Werdegar, J.); *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230, 45 Cal.Rptr.2d 207, 902 P.2d 225; *People v. Williams* (1976) 16 Cal.3d 663, 667, 128 Cal.Rptr. 888, 547 P.2d 1000 ["[W]e do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us"].)

These principles of judicial restraint apply with even greater force here, where the subsidiary constitutional questions the majority addresses are not only unnecessary to the case's disposition but not well presented on the record before us. Consequently, while I concur in the judgment, I do not join in those portions of the majority's analysis that decide the standard of proof or the permissible evidentiary basis for showing forfeiture by wrongdoing.

MORENO, J., concurs.

Court of Appeal, Second Appellate District,
Division Six, No. B166937
**S129852**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

DWAYNE GILES, Defendant and Appellant.

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(Filed May 23, 2007)

The request for modification of the opionion [sic] is denied.

The petition for rehearing is denied.

GEORGE
Chief Justice

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

**William K. Suter**
Clerk of the Court
(202) 479-3011

January 11, 2008

Ms. Marilyn Gail Burkhardt
11301 W. Olympic Blvd #619
Los Angeles, CA 90064

Re: Dwayne Giles
v. California
No. 07-6053

Dear Ms. Burkhardt:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed on or before Wednesday, February 20, 2008. The brief of respondent is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.

Sincerely,

/s/ William K. Suter
Clerk

# PETITIONER'S BRIEF

664

59pgs

No. 07-6053

FILED
FEB 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of California**

## BRIEF OF PETITIONER

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## QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule "extinguishes confrontation claims on essentially equitable grounds." The question presented by this case is: Does a criminal defendant "forfeit" his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

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## OPINIONS BELOW

The opinion of the California Supreme Court (J.A. 31-71) is published at 40 Cal.4th 833, 152 P.3d 433 (2007). The California Supreme Court's one-page order denying rehearing was filed on May 23, 2007. (J.A. 72.) The opinion of Division Six of the Second District Court of Appeal of the State of California was filed on October 25, 2004. The Court of Appeal's order modifying its opinion and denying rehearing was filed on November 22, 2004. The Court of Appeal's modified opinion (J.A. 11-30) is published at 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004).

## JURISDICTION

The California Supreme Court issued its decision in this case on March 5, 2007, and denied petitioner's timely petition for rehearing on May 23, 2007 (J.A. 31, 72). This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

## STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in California state court of murdering his former girlfriend Brenda Avie. At trial, the prosecution, over petitioner's objection, admitted out-of-court statements that Avie made to a police officer about an alleged prior assault by petitioner. While his appeal was pending, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). At the

request of the Court of Appeal, the parties filed briefs on *Crawford*'s impact on petitioner's case. The California Court of Appeal and the California Supreme Court rejected petitioner's argument that the admission of Avie's testimonial hearsay violated the Confrontation Clause and affirmed his conviction.

1. **Trial Proceedings**

As largely recounted in the decisions below, the evidence of the killing consisted of the following. On the night of September 29, 2002, petitioner was socializing with his new girlfriend Tameta Munks, his friend Marie Banks, and his niece Veronica Smith in the garage behind his grandmother's house, where he was living. He received a telephone call from Brenda Avie, a former girlfriend, and then asked Munks to leave, which she did. Shortly thereafter, Avie arrived. Banks noted that Avie argued with petitioner and he tried to pacify her. J.A. 32-33; RT 919-20, 926-27.[1]

Smith went inside the house. Avie left with Banks, intending to go to her father's house. On the way, she saw Munks. She told Banks that she was going back to the petitioner's home because she didn't intend to let "that bitch" visit petitioner. Avie returned to petitioner's home by herself. J.A. 33, 35; RT 922, 927, 931.

Smith heard Avie and petitioner talking outside but couldn't tell what they were saying. She then heard Avie yell "Granny," and heard a series of gunshots. Smith ran outside. Avie was lying on her

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[1] "RT" refers to the Reporter's Transcript. "CT" refers to the Clerk's Transcript.

back in the driveway. Petitioner was standing nearby, holding a nine-millimeter handgun. Avie did not have a weapon. J.A. 33-34.

Avie had six gunshot wounds in her torso area, two of which were fatal. One wound was consistent with her holding up her hand when she was shot, one was consistent with her having turned to the side when she was shot, and one was consistent with her being shot while she was lying on the ground. J.A. 33-34.

Over petitioner's objection, the prosecution presented the testimony of a Los Angeles police officer who interviewed Brenda Avie on September 5, 2002, about an alleged assault by petitioner.[2] The officer testified that on that day, he and his partner went to an address in Los Angeles County. Petitioner answered the door, apparently agitated. Avie was sitting on the bed, crying. The officer interviewed Avie while his partner interviewed petitioner separately. Avie told the officer that she had been talking on the phone with a female friend when her boyfriend, petitioner, got angry with her and accused her of having an affair with her friend. Avie ended the phone call and argued with petitioner. He lifted her off the floor, put her down, and choked her. She broke free and fell to the floor. He climbed on top of

[2] The trial court admitted the evidence under California Evidence Code § 1109, which permits the admission of evidence of prior acts of domestic violence to prove the defendant has a propensity to commit acts of domestic violence; and California Evidence Code § 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury on the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. J.A. 36; RT 1-2, 606-10.

her and punched her face and head. She broke free and crawled onto the bed. Then he opened the blade of a folding knife, held it about three feet from her, and said, "If I catch you fucking around I'll kill you." The officer did not see any physical marks on Avie, but felt a bump on her head. J.A. 35-36; RT 606-08.[3]

Petitioner testified and claimed self-defense. He had dated Avie for several years. He broke up with her in January 2002, but she continued to call and harass him. J.A. 34. Petitioner testified that Avie was volatile and had a history of violence, particularly when she was jealous. When she telephoned him on the night of the shooting, he told her that Munks was there; Avie then became upset and threatened to kill Munks. When Avie arrived and found Munks gone, she threatened to kill Munks when she saw her. Petitioner told Avie to leave, but she did not. Eventually, he told everyone to leave. J.A. 32, 34, 56; RT 635-36, 638-41, 643, 645, 650-53, 686-88, 693, 695.

After Avie and Banks left, petitioner stayed in the garage, putting his compact discs away. When Avie appeared in the driveway, she said, "I know that bitch going to come back here. I'm going to kill you and that bitch." He told Avie to leave, but she refused. When she started to run towards him, he

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[3] The testimonial hearsay about the prior assault also permitted the trial court to instruct the jury that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he "had a disposition to commit another offense involving domestic violence," and to further infer that he was "likely to commit and did commit" the charged murder. CT 92.

grabbed his uncle's loaded gun, which was in the garage. He was very afraid that she had a weapon, although he did not see one because it was dark. As she charged directly at him, he aimed the gun at her, closed his eyes, and fired several shots. He did not intend to kill her. J.A. 34-35; RT 646-48.

On April 3, 2003, the jury convicted petitioner of first degree murder and found a firearm allegation true. J.A. 11, 36; CT 162. He was sentenced to prison for a term of fifty years to life. J.A. 11.

**2. The Decision of the California Court of Appeal**

Petitioner appealed. On March 8, 2004, while his appeal was pending in Division Six of California's Second Appellate District, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36. At the request of the Court of Appeal, both parties filed briefs regarding *Crawford's* impact on petitioner's case. J.A. 2.

On October 25, 2004, the Court of Appeal affirmed the judgment of conviction. J.A. 11, 30. The court rejected petitioner's argument that the admission of Avie's hearsay statements to the police officer violated his Sixth Amendment right of confrontation under *Crawford*. The court held that the rule of forfeiture by wrongdoing barred petitioner from raising a Confrontation Clause objection to the admission of Avie's out-of-court statements to the officer because petitioner caused her unavailability at trial by killing her. J.A. 27. He forfeited his confrontation right, the court held, even though there was no evidence that he killed Avie for the purpose of preventing her testimony at some future trial. J.A. 12, 20.

### 3. The Decision of the California Supreme Court

The California Supreme Court affirmed on March 5, 2007. J.A. 8, 66. The court adopted a formulation of the equitable forfeiture by wrongdoing rule that equated forfeiture with causation, but without requiring defendant to have specifically intended to prevent the witness's testimony. J.A. 32, 54-55. The state high court reasoned that "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." J.A. 52.

California's broad equitable forfeiture rule requires a showing, by a preponderance of the evidence, that the witness is unavailable for trial and the defendant caused the witness's unavailability by an intentional criminal act. J.A. 62-63. In making this determination, the trial court may consider the proffered hearsay, but the hearsay must be supported by independent corroborative evidence. J.A. 63-64. If the elements are shown, the defendant forfeits his right to object under the Confrontation Clause to the admission of the witness's hearsay statements. However, the defendant may still object to the admission of the statements on hearsay and other statutory grounds. J.A. 64.

The California Supreme Court relied on *Reynolds v. United States*, 98 U.S. 145, 158 (1879), and *Crawford v. Washington*, 541 U.S. at 62, to justify its holding that causation alone is sufficient for forfeiture of Confrontation Clause rights, ruling that intent to silence is not an element of the forfeiture rule. J.A. 38-41. Although the court acknowledged that the facts of *Reynolds* involved a defendant's intentional tampering with a witness, it read

*Reynolds* as "describ[ing] the rule without reference to a defendant's motivation." J.A. 52. This Court, it noted, "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." J.A. 41 (citations omitted). Moreover, *Crawford's* characterization of the rule as a "forfeiture" rather than as a "waiver," and as based on "essentially equitable grounds," strongly suggested that the applicability of the rule does not depend on the defendant's motive. J.A. 52. Invoking the equitable principle that "no person should benefit from his own wrongful acts," the court concluded that "[a] defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements that would otherwise be admissible." J.A. 54-55. Accordingly, even though there was no evidence that petitioner killed Avie for the purpose of preventing her testimony at some future trial, the California Supreme Court reasoned that Avie's statement was properly admitted; for otherwise petitioner would benefit from his wrongdoing. J.A. 20, 54-57.

## SUMMARY OF ARGUMENT

The California Supreme Court below read this Court's brief discussion of the "forfeiture by wrongdoing" doctrine in *Crawford v. Washington*, 541 U.S. 36, 62 (2004), as though it endorsed the creation of a broad "forfeiture by causation" exception to a defendant's Sixth Amendment right to confront testimonial evidence presented against him. This purported exception dispensed with any showing of deliberate witness tampering. By adopting this

broad rule, the state court's ruling contravened the core teaching of *Crawford*—that subject to very limited exceptions, the Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay of absent witnesses. Thus, lower courts are not to create "open-ended," newly-minted exceptions to the confrontation right. *Id.* at 54. However, the state court below violated that directive when it adopted a broad exception that departed from all prior understandings of the confrontation right.

The core requirement of the witness-tampering forfeiture rule at common law was a showing of the defendant's specific intent to prevent an expected witness from appearing at a forthcoming trial—that is, that the defendant had sought to undermine the integrity of the judicial process by acting through contrivance or otherwise to prevent the witness's testimony. Causation—that the defendant's conduct caused the witness's unavailability— was a necessary element, but it was never sufficient. As *Reynolds v. United States*, 98 U.S. 145 (1879), and the cases it relies upon make clear, the common law required *both* causation and specific intent to prevent the witness's testimony. For more than two centuries from the founding era through the Court's 2004 *Crawford* decision, the forfeiture exception applied only in cases where the defendant had procured the absence of the witness with the specific goal of keeping the witness away from the courtroom.

Indeed, the ruling below cannot be squared with the common law's recognition of a "dying declaration" exception, and its established application over the centuries. The dying declaration exception applied only to a victim's statement made *after* the infliction

of a fatal wound and only if the victim was aware of impending death at the time that the declaration was made. If such a statement could have been admitted on a mere showing that the defendant caused the witness's death, the more rigorous standards of the dying declaration exception would have been superfluous and would never have developed.

Notably, the common law's specific intent requirement is carried forward and preserved as the bedrock requirement of Federal Rule of Evidence 804(b)(6), which now "codifies the forfeiture doctrine." *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2280 (2006). The Rule allows the admission of "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Its text reflects the consistent practice of the federal courts to insist on specific intent to prevent the appearance of an expected trial witness as a predicate for finding that the defendant relinquished his rights under both the hearsay rule and the Confrontation Clause.

The California Supreme Court's broad forfeiture rule is not only inconsistent with the teachings of *Crawford* and the unbroken tradition of the common law, but is unprecedented in working a wholesale forfeiture of confrontation rights by defendants in nearly all homicide cases. Thus, it plainly contravenes the Sixth Amendment's inclusive guarantee of confrontation rights in "all criminal prosecutions" and our national commitment to preserving basic liberties even for those accused of the most serious crimes. If the California court's logic is accepted, "forfeiture by causation" may well

extend beyond homicide cases to include situations where prosecutors claim victims cannot testify because they have been "traumatized" by the defendant's criminal conduct. The state court's holding and its logical implications, we submit, threaten to unravel this Court's effort in *Crawford* to reinvigorate confrontation rights.

## ARGUMENT

### I. THE CONFRONTATION CLAUSE BARS TESTIMONIAL HEARSAY OF DECEASED WITNESSES, SUBJECT TO A LIMITED NUMBER OF WELL-DEFINED EXCEPTIONS

Time and again, this Court has observed that a defendant's Sixth Amendment right to confront his accusers "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see, e.g.*, *Salinger v. United States*, 272 U.S. 542, 548 (1926); *United States v. Reid*, 53 U.S. 361, 364-65 (1851) (overruled on other grounds by *Rosen v. United States*, 245 U.S. 467, 470 (1918)). Under the common law of 1791, the rule governing testimony by deceased witnesses was clear-cut: absent a prior opportunity for cross-examination, a deceased's statements were inadmissible. As incorporated into the Sixth Amendment, this rule recognized only two exceptions: when that testimony consisted of the "dying declaration of a party murdered," 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 390 (London 1819), and "when it can be proved on oath, that the witness is detained and kept back from appearing by the means and

procurement of the prisoner." GEOFFREY GILBERT, THE LAW OF EVIDENCE 125 (6th ed. London 1801); *see also Crawford*, 541 U.S. at 56 n.6 (dying declarations), 62 (forfeiture by wrongdoing). Neither of these carefully drawn exceptions to the confrontation right is capable of supporting the California Supreme Court's unprecedented holding that a criminal defendant "forfeits" his rights under the Confrontation Clause merely because his misconduct causes a witness to be unavailable to testify even though (as found by the courts below) the defendant had no specific intent to prevent the witness's testimony.

### A. As *Crawford* Teaches, the Common Law of 1791 Generally Barred Testimony by Deceased Witnesses

This case implicates the second of the "two inferences about the meaning of the Sixth Amendment" identified in *Crawford*—"that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and *the defendant had had a prior opportunity for cross-examination*," 541 U.S. at 54 (emphasis added).

By its terms, this proposition bars the use of a deceased witness's statements when there has been no prior opportunity for cross-examination. A deceased witness is "unavailable" in the most basic sense. His testimony is thus inadmissible, absent a prior opportunity for cross-examination.

The English authorities discussed at length in the *Crawford* decision confirm this is the proper understanding of the common law rule. In *King v.*

*Paine*, 87 Eng. Rep. 584 (1696), the King's Bench ruled that a deceased witness's sworn statements to the mayor of Bristol could not be introduced in a libel trial, for "[the defendant] had lost the benefit of a cross-examination." *Id.* at 585. As this Court noted, the *Paine* decision "settled the rule requiring prior opportunity for cross-examination as a matter of common law." *Crawford*, 541 U.S. at 46.

Early nineteenth century cases confirm that the common law barred *ex parte* testimony of a witness who died before trial when not taken in the presence of the accused. *See Crawford*, 541 U.S. at 49-50. Thus, in *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam), the North Carolina high court held that the only depositions which could be read against an accused were those taken in his presence, for "it is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.* at 104; *see also Crawford*, 541 U.S. at 49. In an analogous case, *State v. Campbell*, 30 S.C.L. 124 (App. L. 1844), South Carolina's highest law court excluded a deposition taken by a coroner "notwithstanding the death of the witness." *Id.* at 125. The court reasoned that "such depositions are *ex parte*, and therefore, utterly incompetent." *Id.* The Tennessee court in *Johnston v. State*, 10 Tenn. (2 Yer.) 58 (1821), held that a deceased witness's prior statements were admissible only because they were taken "in the presence of the prisoner and the magistrate before whom he has been brought on a charge of felony. . . ." *Id.* at 59. The court expressly noted that a deceased witness's statements would be barred absent such a prior opportunity for cross-

examination; were a deposition "not taken in [the defendant's] presence, when he could have had the liberty to cross-examine," it would be "rejected." *Id.*

As two cases cited in *Crawford* illustrate, *see* 541 U.S. at 46, the common law rule barring testimonial hearsay by deceased witnesses applied even in murder trials where the statements at issue were made by the victim. The first, *King v. Dingler*, 168 Eng. Rep. 383 (1791), held that statements made by an assault victim to a magistrate were inadmissible, because the magistrate taking the statements did not follow the procedures established by the then-governing Marian statutes. In cases where the proper procedures were followed, the court observed, "the prisoner may have, as he is entitled to have, the benefit of cross-examination." *Id.* at 384. Without such an opportunity, the court found the statements inadmissible, as "no judicial examination has been taken." *Id.* As authority for this proposition, the court cited *King v. Woodcock,* 168 Eng. Rep. 352 (1789). In *Woodcock*, the victim gave a statement to a justice of the peace after she was attacked, but died prior to trial. Again, the court held that because "the prisoner . . . had no opportunity of contradicting" the statements in the deposition, the statements could not be admitted. *Id.* at 353.[4]

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[4] While both *Dingler* and *Woodcock* were decided under Marian statutes, that fact, if anything, strengthens the conclusion that the common law absolutely barred testimonial statements by deceased witnesses absent an opportunity for prior cross-examination. As this Court noted in *Crawford*, "to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law." *Crawford*, 541 U.S. at 54 n.5 (emphasis in original).

There is thus no question about how the common law of 1791 generally approached testimony by witnesses who died before trial. Whether the declarant was living or dead, the same rule applied: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

### B. The Dying Declaration and the Marian Statutes Exceptions to the General Hearsay Prohibition are Inconsistent with a Forfeiture-By-Causation Doctrine

As incorporated by the Sixth Amendment, the common law's general prohibition of testimony by deceased witnesses is subject to only a limited number of well-defined exceptions. This is because the accused's "'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54 (alteration in original) (citations omitted). "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* Apart from the limited exceptions recognized at common law, the Sixth Amendment demands an opportunity for prior cross-examination before the testimony may be admitted.

Neither of the common law exceptions, however, provides any support for the position advanced by the court below that a defendant "forfeits" his

Confrontation Clause right upon a mere showing that the underlying misconduct for which he is being tried caused the unavailability of a witness.

### 1. The Dying Declaration Exception Provides No Support for a Broad Forfeiture Doctrine

The common law dying declaration exception provides no support for the position advanced below. As noted in *Crawford*, 541 U.S. at 56 n.6, the dying declaration exception was "sui generis" and was the *only* exception to the ban against the admission of hearsay evidence against a criminal defendant that was recognized during the framing era. *See also* CHITTY, *supra*, at 390 (describing the "dying declaration of a party murdered" as "one great and important exception" to the otherwise blanket prohibition against hearsay evidence of a criminal defendant's guilt). Notably, the dying declaration exception applied only to a victim's statement made *after* the infliction of a fatal wound and only if the victim was aware of impending death at the time that the declaration was made.

The dying declaration doctrine was first recognized in 1722 in *King v. Reason*, 16 How. St. Tr. 1 (K.B. 1722). Specifically, this exception to the otherwise strict ban against criminal hearsay allowed "'the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,'" provided that "'the deceased at the time of making such declarations was conscious of his danger.'" *Id.* at 24-25. Thus, the exception was created because there could be instances in which the victim's dying statements would be the only source of such vital information as the identity of the

assailant. However, because it was an exception to the principles of evidence, it was restricted to instances in which the victim was aware of impending death, on the presumption that that circumstance was equivalent to the solemnity of testimony under oath.

The strict limits on the dying declaration exception were settled features of framing-era doctrine. *See, e.g., Dingler*, 168 Eng. Rep. at 384 (noting that the prosecuting counsel conceded that a victim's statement, taken when the victim was unaware that her wound would be fatal, could not be admitted as a dying declaration); *see also State v. Moody*, 3 N.C. 50, 1798 WL 93, at *1 (Super. L. & Eq. 1798) (declining to admit murder victim's statement as dying declaration because it was given six or seven weeks prior to his death, rather than by "one so near his end that no hope of life remains" so that "the solemnity of the occasion [would be] a good security for his speaking the truth, as much so as if he were under the obligation of an oath").

Additionally, at common law, the dying declaration exception was limited to statements by the decedent "as to the fact [that is, the crime] itself."[5] *Reason*, 16 How. St. Tr. 24-25. Thus, the exception permitted only statements about the immediate circumstances of the infliction of the fatal injury and the identity of the assailant. *See also* 5 JOHN HENRY WIGMORE,

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[5] Framing-era authorities often used "fact" as a synonym for the charged crime. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES 301 (1769) (noting the requirement that the date and township "in which the fact was committed" be included in an indictment).

EVIDENCE AT TRIALS AT COMMON LAW § 1431-3 (James H. Chadbourn rev. ed. 1974).

Of course, the very existence of the dying declaration exception is flatly inconsistent with the California court's broad forfeiture-by-causation rule. Had there been any such rule in 1791 or thereafter allowing the automatic admission of any hearsay account of statements made by an alleged homicide victim, the dying declaration exception would have been totally superfluous and never developed. Thus, the dying declaration exception in itself proves the novelty and extremity of the lower court's ruling in this case.

### 2. Exceptions Under the Marian Statutes Provide No Support for a Broad Forfeiture Doctrine

The rule that a properly taken and sworn Marian examination was admissible at trial if the witness who had given it was dead, too ill to travel, or kept away by the defendant similarly provides no support for the forfeiture-by-causation theory advanced below. *See generally* 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 605 (Thomas Leach ed., 1787) (stating rule). As noted in *Crawford*, the Marian procedures were widely understood to be in derogation of the common law, 541 U.S. at 54 n.5, and by the mid-nineteenth century, English courts routinely required a prior opportunity for cross-examination even when a witness's statement was taken pursuant to the statutes. "When Parliament amended the statutes in 1848 to make the requirement explicit . . . the change merely 'introduced in terms' what was already afforded the defendant 'by the equitable construction

of the law.'" *Id.* at 47 (quoting *Queen v. Beestom*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C.J.)).

Even if decisions under the Marian statutes were somehow pertinent to the question of how the right of confrontation was understood at common law, they would provide no support for the California court's broad forfeiture doctrine. The principle that a deceased's witness's testimony could be admitted applied only to formally sworn statements given by witnesses after the commission of a crime.

Framing-era law did not treat the absence of a witness resulting from the defendant's intentional witness tampering any differently than the other recognized forms of witness unavailability such as death and illness. Thus, unlike current deliberate witness tampering doctrine, framing-era law permitted the admission of an unavailable witness's Marian examination only if the defendant had an opportunity to cross-examine when it was taken. In *King v. Woodcock,* 168 Eng. Rep. 352, *cited in Crawford,* 541 U.S. at 54 n.5, a murder victim had given a statement to a justice of the peace after she was attacked, but had died prior to trial. The court ruled that the statement was inadmissible as a Marian examination because it had been taken "extrajudicially"—that is, not at the time of the arrest of defendant and in circumstances in which the defendant had an opportunity for cross-examination. As a result, the court ruled that the victim's statement could be admitted only if it qualified as a dying declaration (that is, only if the victim had been aware of impending death). *Woodcock* plainly demonstrates that there was no doctrine that a

murder victim's statement could be admitted simply because the defendant was alleged to have killed the victim. Rather, the absence-procured-by-defendant doctrine was restricted to properly taken Marian examinations.

The same conclusion is demonstrated even more powerfully by *Dingler,* 168 Eng. Rep. 383, *cited in Crawford,* 541 U.S. at 54 n.5. In *Dingler*—a case in which the prosecutor conceded that the post-attack statement of the deceased victim could not constitute a dying declaration because the victim had not been aware of impending death—the court nevertheless ruled that the victim's post-attack statement to a justice of the peace was also inadmissible as a Marian examination because it had not been taken in the presence of the defendant at the time of his arrest. *Dingler*, 168 Eng. Rep. at 383-84. The rule that only a properly taken Marian deposition could be admitted is also demonstrated by *State v. Moody.* There, the court rejected the deceased victim's statement as a dying declaration and also rejected it as a Marian deposition, notwithstanding the fact that the statement had been taken in defendant's presence, because it had not been properly sworn when taken. 3 N.C. at 50-51, 1798 WL 93, at *1-2. *Moody* therefore demonstrates that the fact that defendant allegedly caused the victim's death did not suffice to admit the victim's statement.

Thus, although the admission of Marian depositions under the forfeiture doctrine restricted a defendant's confrontation right insofar as he was precluded from the usual right to confront and cross-examine the witness in the presence of the trial jury itself, the defendant was *never* wholly deprived of the

right to cross-examine the witness under the framing-era absence-procured-by-defendant rule. The framing-era intentional witness tampering doctrine impinged on a defendant's confrontation right, but did not extinguish it.

In sum, both English and early nineteenth-century authorities demonstrate the overarching common law rule that a deceased witness's testimony could not be admitted absent a prior opportunity for the defendant to cross-examine the witness. As we discuss next, the remaining principal exception—the doctrine of procurement or contrivance that originated in *Lord Morley's Case*—plainly required that the defendant act with a specific intent to prevent the witness from testifying.

## II. THE COMMON LAW RECOGNIZED A NARROW EXCEPTION TO THE GENERAL HEARSAY PROHIBITION WHERE THE DEFENDANT BY PROCUREMENT OR CONTRIVANCE KEPT THE WITNESS AWAY TO PREVENT HIS TESTIMONY

### A. The Procurement Exception, as Articulated in *Reynolds*, Contained a Specific Intent Requirement and Applied Only to Statements Previously Made Under Oath

In *Crawford*, this Court, relying on *Reynolds v. United States*, 98 U.S. 145, stated that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62. *Reynolds* and the decisions it relied upon established that the forfeiture doctrine applies only when the defendant has acted with specific intent to prevent the witness's

testimony at trial, by "procuring" the witness's absence or otherwise "contriving" to keep the witness away.

The defendant in *Reynolds* was tried for bigamy. 98 U.S. at 146. The prosecution attempted to call his second wife to testify against him, but was prevented from doing so by the defendant's refusal to reveal her location to a process server. In response, the trial court admitted testimony that the wife had given in a previous trial on the same issue. *Id.* at 159-60. On appeal to this Court, Reynolds argued that the use of this previously sworn testimony violated the Confrontation Clause.

The Court resolved Reynolds' constitutional claim by adopting the witness tampering rule of *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L. 1666). The Court began its analysis by describing the general rule applicable at common law:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition

> to assert that his constitutional rights have been violated.

98 U.S. at 158.

The Court emphasized that it was not adopting any new principle: "We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on principles of common honesty, and, if properly administered can harm no one." *Id.* at 159. In so holding, the Court cited *Lord Morley's Case*, 6 How. St. Tr. 769; *Harrison's Case*, 12 St. Tr. 833 (1692); *Drayton v. Wells*, 1 Nott & McC. 409, 1819 WL 692 (1819); *Queen v. Scaife*, 117 Eng. Rep. 1271 (1851); and *Williams v. State*, 19 Ga. 403, 1856 WL 1804 (1856), as precedent for the procurement exception.

The Court noted the defendant chose to remain silent when he was given an opportunity at trial to disclose the witness's location or to deny under oath that he had kept her away. 98 U.S. at 160. The Court viewed Reynolds' silence as a tactical decision that he would be better off by preventing her from testifying than by confronting her on the stand: "Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own." *Id.* Consequently, the Court held that the witness's testimony on the same issue at a prior trial, where the defendant had "full opportunity for cross-examination," *id.*, was properly admitted. Thus, the defendant forfeited his right to confrontation not

because of his criminal wrongdoing generally but because he had procured the absence of the witness to prevent her testimony at the retrial.

### 1. The Common Law Precedent Relied on in *Reynolds* Defined Procurement to Require a Showing that the Defendant Specifically Intended to Prevent the Witness From Testifying at Trial

The forfeiture rule was initially articulated in *Lord Morley's Case*. Prior to Lord Morley's trial for murder, the judges of England agreed that if any witness who had been examined by the coroner did not appear at trial, the written examination of that witness was admissible if the witness was dead, unable to travel, or "detained by means or procurement of the prisoner." 6 How. St. Tr. at 770-71. When the Crown sought permission to read the coroner's examination of Thomas Snell, an absent witness, the Lord Chief Justice "delivered the opinion, That if the court upon any evidence were satisfied, the witness was withdrawn by the procurement of the prisoner, the deposition ought to be read, otherwise not." *Id.* at 776–77. Although Snell's master then testified that Snell had run away after stating that "Lord Morley's trial was to be shortly but he would not be there," the court held that this evidence was not sufficient to satisfy the rule and Snell's examination was not read. *Id.* at 777.

Consistent with *Lord Morley's Case*, the other cases relied upon in *Reynolds* restricted the absence-by-procurement rule to instances in which a defendant deliberately kept away from trial a witness

who had previously given sworn testimony. For example, in *Harrison's Case*, 12 St. Tr. 833, the English court admitted an absent witness's previous testimony at a coroner's inquest. Prosecuting counsel argued that his examination should be read, because "Mr. Harrison's agents or friends have, since the last sessions, made or conveyed [the witness] away," and presented evidence that a man had tried to bribe the witness to be "kind" to Harrison, *id.* at 851, that the witness had been "inticed away by three soldiers," and that efforts to locate him had failed. *Id.* at 851-52. Satisfied that the defendant "made [the absent witness] keep away," that is, that the defendant had procured the witness's absence, the court allowed the coroner's examination to be read into evidence. *Id.* at 852.[6]

The principle requiring a defendant who acts with specific intent to procure the absence of a witness

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[6] Four years later, the admissibility of a witness deposition also arose in the attainder proceeding in Parliament in *Fenwick's Case*, 13 How. St. Tr. 537 (H.C. 1696). Sir John Fenwick was charged with high treason, and a key prosecution witness, Goodman, did not appear at trial. The prosecution argued that Goodman's examination should be read because Fenwick had procured Goodman's absence by bribes made by Lady Fenwick and others. *Id.* at 579, 583, 588-91, 594. The Speaker of the House described the issue as an "offer to prove that this very person hath been tampered with to take off his testimony." *Id.* at 590. Although the peers ultimately voted to admit the examination while acting in their legislative capacity, the arguments of counsel demonstrate that the common law doctrine, per *Lord Morley's Case*, was still that a coroner's examination was admissible only if the defendant had deliberately interfered to prevent the appearance of a person who previously had formally given a sworn examination.

was similarly applied in *Drayton v. Wells*, 1 Nott & McC. 409, 1819 WL 692. There, the South Carolina court considered the admission of a statement by a witness who had forgotten what he had previously testified to. The court stated:

> The books enumerate four cases only, in which, the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence: 1st. Where the witness was dead; 2nd. Where he was insane; 3rd. Where he was beyond seas; and 4th. Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party.

*Id.* at *2. Based on this reasoning, the court refused to admit the previous trial testimony. *Id.* at *3.

Another case cited in *Reynolds* that makes clear the importance of the defendant's intent to procure a witness's absence is *Queen v. Scaife*, 117 Eng. Rep. 1271. There, the court allowed an absent witness's earlier testimony, which was taken in front of a magistrate, to be admitted only against the defendant who had procured the witness's absence. The prosecutor had proved that a witness was kept away by the defendant Smith but there was no evidence that the other defendants, Scaife and Rooke, were involved in procuring the witness's absence. Allowing the deposition to be admitted against Smith only, Chief Justice Lord Campbell stated: "The prisoner Smith had resorted to a contrivance to keep the witness out of the way; and therefore the

deposition was admissible evidence against him: but it was not so against the other two prisoners. . . ." *Id.* at 1273.

In the last case cited by *Reynolds*, the Georgia court refused to admit an absent witness's prior testimony taken before a magistrate. *Williams v. State*, 19 Ga. 403, 1856 WL 1804. Citing *Lord Morley's Case* for the proposition that a defendant can forfeit his confrontation rights if he procures the witness's absence, the court held that the state had presented insufficient evidence to support a finding "that prisoner had induced Thomas to absent himself from Court." 1856 WL 1804, at *1.

Each of the decisions cited in *Reynolds* shares two important features. First, the central inquiry in each is whether the defendant specifically intended to prevent the testimony of an absent witness. Without proof of such specific intent, the prior testimony was excluded from trial. Second, each case considered whether to admit testimony given under oath at a coroner's inquest, former trial or deposition taken before a magistrate.

**2. Contemporaneous Definitions of the Terms "Procure" and "Contrive" Confirm the Specific Intent Requirement**

The specific intent requirement is further reflected in the language used in the applicable cases, which makes clear the particular meaning these words held in English and early American common law. The term "procure," which figures prominently in *Lord Morley's Case*, 6 How. St. Tr. at 771, 777, and *Reynolds*, 98 U.S. at 158, and is also preserved in Federal Rule of Evidence 804(b)(6), clearly connotes a

deliberate intent to carry out a specific design. The leading dictionary of the early republic defines the term as follows:

> 1. To get; to gain; to obtain; as by request, loan, effort, labor or purchase.
>
> 2. To persuade; to prevail on.
>
> 3. To cause; to bring about; to effect; to contrive and effect.
>
> 4. To cause to come on; to bring on.
>
> 5. To draw to; to attract; to gain.[7]

1 NOAH WEBSTER, REVISED UNABRIDGED DICTIONARY (1828), *cited in Crawford*, 541 U.S. at 51. Notably, only one of these definitions (def. 3) arguably supports the lower court's forfeiture-by-causation theory, and then only if the first half of that definition is artificially read in isolation. *Cf. Jones v. United States*, 527 U.S. 373, 389 (1999) ("language must be read in context and a phrase gathers meaning from the words around it") (internal quotation marks omitted). As Webster's definition of "cause" ("That which produces an effect") (def. 2) further suggests, "cause" and "procure" are distinct.

The Oxford English Dictionary ("OED") likewise defines "procure" as "To contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) to or for a person." OED 559 (2d ed. 1989) (def. 2) (original

[7] *See also* 1 CHARLES RICHARDSON, A NEW DICTIONARY OF THE ENGLISH LANGUAGE 1514 (London 1837) (defining "procure" as "to take *care* for; to take *care* or heed, (sc.) that any thing be done; to urge or endeavor, to manage or contrive that it be done; to acquire to obtain").

emphasis omitted) (citing uses from 1330-1608). Newer definitions of "procure" which appear in the OED confirm that the term assumes an intent to carry out a specific plan. *See, e.g., id.*, def. 4 ("To bring about by care or pains; also (more vaguely) to bring about cause, effect, produce") (citing uses from 1340-1861); *id.*, def. 5 ("To obtain by care or effort; to gain, win, get possession of, acquire.") (citing uses from 1297-1874).

The term "contrive," used in two cases that *Reynolds* cited,[8] is included within the previously quoted definitions of "procure," and appears in at least one contemporaneous treatise to describe the standard for forfeiture of Confrontation Clause rights.[9] Like "procure," "contrive" clearly connotes a deliberate intention to carry out a specific design or plan. Thus, Webster's defines the term as "To invent; to devise; to plan." WEBSTER'S, *supra*, def. 1. The OED is even more illuminating, defining the term as "To invent, devise, excogitate with ingenuity and cleverness any plan or purpose" and "[especially]

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[8] *See Queen v. Scaife*, 117 Eng. Rep. at 1273 ("The prisoner Smith has *resorted to a contrivance to keep the witness out of the way*; and therefore the deposition was admissible evidence against him.") (emphasis added); *Drayton v. Wells*, 1 Nott & McC. 409, 1819 WL 692, at *2 (holding that "where the Court was satisfied that *the witness had been kept away by the contrivance of the opposite party*," the "testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence.") (emphasis added).

[9] *See* SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAWS OF EVIDENCE 154 (1st ed. 1814).

used of the planning or plotting of evil devices, treason, treachery, murder, etc." OED 851 (def. 1) (citing uses from 1325-1864).

Thus, as understood at the founding, both "procure" and "contrive" assume an intent to use a particular means to bring about, endeavor toward, prevail, or obtain a particular result with a plan or purpose. The terms do not mean merely "to cause," but instead contemplate an endeavor or scheme to cause something particular to occur.

### 3. Contemporaneous Treatises Reflect the Procurement Exception's Emphasis on Specific Intent

Three contemporary treatises cited in *Reynolds* confirm the Court's recognition that specific intent is a necessary condition of the absence-procured-by-defendant rule. The Court relied on these authorities for the principle "that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence." 98 U.S. at 158-59 (citing 1 GREENLEAF, EVIDENCE, § 163; 1 TAYLOR, EVIDENCE, § 446; 1 WHARTON, EVIDENCE, § 178). This limitation—that a witness be "kept away by the adverse party"—makes clear that the absence-by-procurement doctrine turned on the defendant's specific intent.

Each of these treatises indicates that the procurement exception applies only when the defendant has intentionally procured the absence of the witness or kept the witness away to prevent his testimony. Thus, Greenleaf explains the absent witness exception as follows:

> In the fifth class of exceptions to the rule rejecting hearsay evidence may be included the testimony of deceased witnesses, given in a former action, between the same parties . . . . It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, *but appears to have been kept away by the adverse party.*

1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 198 (13th ed. 1876) (emphasis added).[10]

Other leading treatises published before the *Reynolds* decision confirm that at common law the procurement exception applied only when the defendant had kept the witness away for the purpose

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[10] *See also* JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 465 (6th ed. 1872) ("The proposition that, *if a witness be kept out of the way by the adversary*, his former statements on oath will be admissible, rests, partly, on the authority of several decisions both in the civil and criminal courts; partly, on the analogies furnished by one or two statutes; but chiefly, on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition *might be read in evidence as against the man who had kept him out of the way*, but should not be received against the other two men." (citations omitted) (emphasis added)). *See also* FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 170 (8th ed. 1880) ("In criminal cases the testimony of a former witness, *corruptly or otherwise unlawfully kept from court by the party against whom he is called*, it has been held, may be in like manner reproduced, the defendant in the former trial having had the opportunity of cross-examining the witness.") (emphasis added).

of preventing his testimony at trial. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE 125 (6th ed. 1801) (stating that previous testimony is admitted when "when it can be proved on oath, that the witness is detained and kept back from appearing by *the means and procurement of the prisoner.*") (emphasis added); SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAWS OF EVIDENCE 154 (1st ed. 1814) (witness's former testimony may be read despite hearsay objection "if it can be proved, that he has been kept away by the *contrivance* of the other party.") (emphasis added); EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1st ed. 1858) (procurement exception applies when the witness "had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, *in order to prevent him from giving evidence against him*") (emphasis added).

Each of the treatises confirms the common law requirement that the defendant have acted to keep the witness away through contrivance or procurement to prevent the witness's testimony. By contrast, not one even suggests that a defendant would forfeit his confrontation rights if he killed a witness without the intention of preventing his testimony. The treatises recognize a further additional limitation on the procurement exception—the hearsay statement must have been originally made by the absent witness under oath "either orally in court, or in written depositions taken out of court." 1 GREENLEAF, *supra*, at 198.

### B. This Court's Post-*Reynolds* Decisions Further Confirm the Specific Intent Requirement

This Court's decisions applying *Reynolds* and its progeny also provide no support for the broad forfeiture rule adopted by the court below. In the 125-year period between *Reynolds* and *Crawford*, *Reynolds* has been applied in only three cases: *Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba Co.*, 116 U.S. 410 (1886), *Motes v. United States*, 178 U.S. 458 (1900), and *Diaz v. United States*, 223 U.S. 442 (1912). *Motes*, in turn, was applied in *Douglas v. Alabama*, 380 U.S. 415 (1965). The central issue in each of these cases was whether the defendant abused his constitutional right to confrontation in order to manipulate or thwart the judicial system.

*Eureka Lake* upheld service of process on a corporation by nontraditional means when the corporate agent intentionally avoided the process server. Relying on *Reynolds*, the Court held that the corporation forfeited its usual right to service of an order to show cause upon an officer or agent because the officers or agents kept themselves out of the way "for the express purpose of avoiding service." 116 U.S. at 418.

In *Motes*, a witness for the prosecution, Taylor, who was in state custody, absconded immediately before he was called to testify at trial. When Taylor could not be located, the trial court admitted a statement by Taylor taken at a preliminary examination where the defendants had no opportunity for cross-examination. 178 U.S. at 467-71. Relying on *Reynolds*, this Court held that the

admission of Taylor's statement violated the defendants' confrontation rights because "there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused." *Id.* at 471-74.

In *Diaz,* the defendant introduced into evidence hearsay statements of witnesses who were absent from trial. 223 U.S. at 449-50. Relying on *Reynolds,* this Court held that because the defendant, "by his voluntary act," introduced the evidence and "thereby sought to obtain an advantage from it," he waived his right to confrontation. *Id.* at 452-53.

Finally, in *Douglas v. Alabama,* 380 U.S. 415, the prosecution sought to introduce an accomplice's pre-trial confession that implicated the defendant, because the accomplice had invoked his Fifth Amendment privilege against self-incrimination and refused to testify. *Id.* at 417-18. This Court held that the defendant's inability to cross-examine the accomplice about the alleged confession "plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419. Under these circumstances, the Court explained, the testimony could come in without violating the Confrontation Clause only if the accomplice's refusal to testify was "procured by the petitioner"—that is, only if the defendant had engaged in conduct that undermined the integrity of the judicial system. *Id.* at 420.

These cases confirm that *Reynolds'* specific intent holding was no anomaly, but a well-established feature of this Court's nineteenth and twentieth century Confrontation Clause jurisprudence. Perhaps

more importantly, these cases demonstrate the novelty of the lower court's forfeiture-by-causation doctrine—a doctrine untethered to the specific intent requirement that this Court has adhered to since *Reynolds*.

## III. THE MODERN FORMULATION OF THE PROCUREMENT EXCEPTION AS A WAIVER OR FORFEITURE BY MISCONDUCT DOCTRINE CONTAINS A SPECIFIC INTENT REQUIREMENT

Federal and state courts have consistently applied the forfeiture rule only in cases where there was witness tampering and required proof that the defendant specifically intended to prevent the witness's testimony.

In December 1976, *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), became the first modern federal circuit decision to apply the procurement or contrivance exception. Although the court referred to the exception as a "waiver" doctrine, the change in terminology did not change the underlying standard; the waiver/forfeiture rule was applied in *Carlson* to deal with witness tampering by the defendant. For some thirty years—until some courts like the California Supreme Court interpreted *Crawford* to deny confrontation rights to defendants whose misconduct caused the unavailability of a witness but without any specific intent to tamper with the witness—federal and state courts applied the forfeiture rule only in cases where there was witness tampering and required proof that the defendant specifically intended to prevent the witness's testimony.

Starting in 1976, federal courts began to expand the concept of a prior statement by a "witness" to include statements made when the defendant had no opportunity for cross-examination. In *Carlson,* a person who had testified before the grand jury did not appear at trial because defendant intimidated him. The court noted that it could not identify any previous federal or state cases involving admission of prior grand jury testimony under the intentional witness tampering rule, *id.* at 1358, but upheld the admission of the witness' grand jury testimony because it exhibited indicia of reliability insofar as it had been under oath and subject to the sanction of perjury and because "the law [should not] permit an accused to subvert a criminal prosecution by causing witnesses not to testify who have, at the pretrial stage, disclosed information which is inculpatory as to the accused." *Id.* at 1359.[11] Thus, *Carlson* still limited what it termed the "waiver" doctrine to a defendant's deliberate tampering with a person who was a "witness" at least in the sense of having previously given sworn testimony about the crime.

Following *Carlson,* courts applied the deliberate witness-tampering rule to cases in which the defendant deliberately prevented the appearance of a person who simply had provided information informally in an ongoing investigation of a crime and

[11] It should be noted that this curtailment of the earlier confrontation right in *Carlson* occurred during the period in which the confrontation right was effectively subsumed under a reliability-focused hearsay inquiry such as that articulated in *Ohio v. Roberts,* 448 U.S. 56 (1980). Of course, this Court repudiated the *Roberts* formulation as an inadequate construction of the confrontation right in *Crawford.*

who was anticipated to appear as a witness in a reasonably foreseeable future trial of that crime. For example, in *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), a drug racketeering and murder case, the court permitted the admission into evidence of unsworn recorded statements which a member of the drug gang had made to police prior to his own murder by the gang. The statements incriminated the defendants in previous murders and on-going drug distribution crimes. The informant's statements were admitted because evidence showed defendants had "successfully conspired to execute [the witness] *for the express purpose of preventing his cooperation with the authorities*." *Id.* at 1278 (emphasis added). Although the court recognized that "the reported cases" relating to the "waiver by misconduct" exception to the confrontation right "all appear to involve actual witnesses" who had previously given formal testimony, the court concluded that:

> the waiver-by-misconduct doctrine should ... apply with equal force if a defendant intentionally silences a potential witness ... in order to prevent him from assisting an ongoing criminal investigation ... as long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges ... [because] it is *the intent to silence* that provides notice [that defendants were waiving their trial right of confrontation when they deliberately tampered with the potential witness].

*Id.* at 1279-80 (emphasis added).

Effective December 1, 1997, this Court promulgated Federal Rule of Evidence 804(b)(6). 171

F.R.D. 708 (Apr. 11, 1997). The Rule "codifies the forfeiture doctrine." *Davis*, 126 S. Ct. at 2280. Entitled "[f]orfeiture by wrongdoing," the Rule expressly incorporates the specific intent requirement:

> Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing *that was intended to, and did, procure* the unavailability of the declarant as a witness.

(Emphasis added).

As the text makes clear, "forfeiture by wrongdoing" requires both (1) causation (that the defendant in fact procured the unavailability of the witness) and (2) specific intent (that the defendant specifically "intended to" render the witness unavailable).

Not only the text of Rule 804(b)(6) but also the decisions the rulemakers relied on in considering the Rule provide that the defendant's specific intent to prevent the witness's testimony is required before "forfeiture by wrongdoing" may be found. The Advisory Committee's notes list a number of decisions illustrating the working of the forfeiture doctrine. 117 F.R.D. at 719. Two of the decisions involved a murder of the witness in question; both required an explicit finding that the defendant murdered the witness for the specific purpose of preventing the witness's testimony.

In *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), the defendant had been convicted of both

RICO violations and conspiracy to violate the civil rights of a principal government witness by murdering the witness. Although the trial court based its admission of the decedent witness's testimony on Rule 804(b)(5), the panel found that "other grounds support the admission of the [witness's] statements" and that defendant's "waiver of his right to confrontation in these circumstances also constituted a waiver of any hearsay objection." *Id.* at 629-30. Relying on the trial court's finding that the defendant "killed [the witness's] because [the witness] intended to testify against him," *id.* at 624, the court upheld admission of the witness's out-of-court testimony; "a defendant who causes a witness to be unavailable for trial *for the purpose of preventing that witness from testifying* . . . waives his right to confrontation under the *Zerbst* standard." *Id.* at 630 (emphasis added).[12] The *Thevis* panel made clear that a waiver or forfeiture of Confrontation Clause rights requires a finding of both causation *and* specific intent to silence the witness: "Whether a waiver existed in this case requires analyzing two separate questions: whether a defendant's murder of a witness *for the purpose of preventing his testifying at trial* constitutes a valid waiver, and what standard of proof the government must bear in proving that waiver." *Id.* (emphasis supplied).

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[12] In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), this Court stated that to constitute a valid waiver of a constitutional right there must be "an intentional relinquishment or abandonment of a know right or privilege" by the accused.

The Advisory Committee notes cite to a second murder case, *United States v. Mastrangelo,* 693 F.2d 269 (2d Cir. 1982). In that case, the defendant, convicted of various drug charges, appealed the admission into evidence of hearsay testimony from a murdered witness. The Second Circuit panel remanded to the district court for an evidentiary hearing on defendant's involvement in the murder of the witness. On remand, the trial court framed the question as whether defendant had "effectively waived his rights under the confrontation clause of the sixth amendment through complicity in the murder of the principal witness against him." *United States v. Mastrangelo,* 561 F. Supp. 1114, 1115 (E.D.N.Y. 1983). The court identified the defendant's prior statement that the witness would never take the stand as "evidence of [defendant's] *intent* to prevent [witness] from testifying, or, at least, of his knowledge that others would prevent [witness] from testifying" and included that finding as a factor in deciding to apply the doctrine. *Id.* at 1120. The decisions in *Thevis* and *Mastrangelo,* both expressly relied upon by the rulemakers, demonstrate that the "waiver by misconduct" doctrine required a showing of specific intent on the defendant's part to prevent the witness's testimony as a condition for allowing out-of-court testimony from a murdered witness.

The drafters of Rule 804(b)(6) were plainly concerned with witness tampering. The Advisory Committee note state that the Committee "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself,'" and cites cases in which defendants or their agents acted to prevent

testimony. 163 F.R.D. at 157 (citing *Mastrangelo*, 693 F.2d at 273 (murder); *United States v. Aguiar*, 975 F.2d 45 (2d Cir. 1992) (threats); *United States v. Potamitis*, 739 F.2d 784, 788-89 (2d Cir. 1984) (same); *United States v. Balano*, 618 F.2d 624, 629-30 (10th Cir. 1979) (same); *Carlson*, 547 F.2d at 1352-53 (same); and *Steele v. Taylor*, 684 F.2d 1193, 1198-99 (6th Cir. 1982) (influence)).[13]

The history of the Rule shows that the initial draft also contained the specific intent element but was entitled "waiver by misconduct," the nomenclature used by most federal courts. During the drafting process, the Committee substituted the word "forfeiture" for "waiver" because it believed that "forfeiture" better described the rationale of the rule. It also substituted "wrongdoing" for "misconduct" to make the rule consistent with Federal Rule of Evidence 804(a). The change in the title did not change the scope of the rule. The intent-to-silence element remained in the rule despite the Committee's preference for the language of "forfeiture" in the title of the rule.[14]

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[13] The Committee rejected a proposal that the Rule refer expressly to witness tampering because it believed that the text made clear that the rule applied only when the object was to procure the witness's absence. Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

[14] The Advisory Committee's minutes are sparse, but they clearly indicate that the change in title was not intended to change the rule:

> A number of objections were voiced about the text of the proposal: 1. that "forfeiture" rather than "waiver" more appropriately captures the rationale underlying the rule. . . .

## IV. THE CALIFORNIA SUPREME COURT'S ATTEMPT TO CREATE A BROAD EQUITABLE FORFEITURE DOCTRINE IS INCONSISTENT WITH *CRAWFORD'S* UNDERSTANDING OF THE CONFRONTATION RIGHT

Noting the post-*Crawford* response of some courts to "focus on the equitable forfeiture rationale [so as to] eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases," J.A. 46, the California high court in this case embraced an application of the forfeiture rationale creating a categorical exclusion from Sixth Amendment confrontation rights for all witness-homicide cases. This sweeping application of the doctrine cannot be squared with this Court's Sixth Amendment jurisprudence.

As this Court's decision in *Crawford* makes clear, the Sixth Amendment right of confrontation reflects a particular vision of what a criminal trial should look like. Rejecting "the civil-law mode of criminal procedure, and particularly its use of *ex parte*

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3. that the rule should be written so that it will apply only when the defendant's intent is to tamper with a witness. . . .

The Committee agreed that "forfeiture" is a more appropriate term than "waiver" and voted to make that change in the rule and accompanying note. . . .

The Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed test states that the rule applies only in instances in which the party's objective was to "procure the unavailability of the declarant as a witness." Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

examinations as evidence against the accused," the Framers chose to follow the practice of early American and common law courts, which demanded that witnesses testify in-court, under oath, in the presence of the jury, and subject to cross-examination by the accused. *Crawford*, 541 U.S. at 50; *see id.* at 43 ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.").

*Crawford* also teaches that courts may not undermine the Founders' vision of how criminal trials are to be conducted through creative judicial policymaking. *See, e.g.*, *id.* at 54 ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."); *id.* at 67 ("The Framers ... were loath to leave too much discretion in judicial hands."). Thus, the Court observed that while the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence," the right of confrontation is ultimately "a procedural rather than a substantive guarantee." *Id.* at 61. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*

The expansive new forfeiture doctrine adopted by the California Supreme Court is completely at odds with this understanding of the Confrontation Clause. In at least two ways, the lower court's ruling ensures that forfeiture—not confrontation—will be the norm in criminal trials where the forfeiture-by-causation doctrine is applied.

First, California's forfeiture doctrine excludes an entire class of criminal defendants—i.e., homicide defendants (and perhaps others who allegedly physically or psychologically caused the victim's unavailability)—from the protections of the Confrontation Clause. As petitioner's case well illustrates, any time a defendant is charged with murder, any and all of the alleged victim's prior statements will be admissible against the defendant, both in the murder case and in any other prosecution to which the statements might relate.

This result is plainly inconsistent with the text of the Sixth Amendment, which provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him" in "*all* criminal prosecutions." Amdt. 6 (emphasis added). There is no principled basis for exempting homicide suspects from the protection of the Confrontation Clause. Indeed, as *Crawford* recognized, it is in trials for the gravest offenses that the right of confrontation is most urgently needed. *Crawford*, 541 U.S. at 44 (noting "[t]he most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries.").

Second, the logic of California's forfeiture rule could be applied to any traumatic crime, even if the alleged victim is physically able to appear and testify. Already, prosecutors and other commentators have suggested that the defendant should forfeit his right to confrontation whenever a witness refuses to testify due to the trauma of an alleged criminal act. *See, e.g.*, Adam M. Krischer, *"Though Justice May be Blind, It Is Not Stupid," Applying Common Sense To Crawford In Domestic Violence Cases*, 38

PROSECUTOR 14, 15-16 (Nov.-Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeited their right to confront their victims); Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 469-70 (2006) (arguing that the existence of a battering relationship is sufficient to excuse the appearance of an otherwise available alleged victim and to conclude that the defendant caused the witness's absence). Under this logic, when there is plausible evidence that the defendant is responsible for the traumatising crime, the alleged victim's testimonial hearsay would be admitted, even if the victim has independent, personal, or self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships.

The expansive rule of forfeiture by wrongdoing also undermines the prosecution's incentive to locate and present the witness to the fullest extent feasible whenever previous testimonial hearsay statements are available. Of course, cross-examination of an officer repeating hearsay is not an effective substitute for cross-examination of the declarant, because the officer who merely heard the hearsay statement cannot modify or recant it.

Moreover, the California court fundamentally misconstrued the scope of its equitable power to limit a defendant's constitutional rights. Equity does not mean that courts can take whatever measures they happen to think is fair based on the defendant's alleged misconduct. In the context of constitutional

criminal procedure rights, forfeiture of those rights requires conduct that intentionally undermines the judicial process or threatens to "destroy the integrity of the criminal-trial system." *Davis v. Washington*, 126 S. Ct. at 2280; *see, e.g.*, *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant forfeits his right to be present at trial when, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"); *Taylor v. United States*, 414 U.S. 17 (1973) (defendant forfeits his right to be present at trial by voluntarily absenting himself from trial); *Walder v. United States*, 347 U.S. 62, 65 (1954) (defendant forfeits his right to exclude physical evidence obtained in violation of the Fourth Amendment when he resorts to offering "perjurious testimony in reliance on the Government's disability to challenge his credibility"); *Taylor v. Illinois*, 484 U.S. 400 (1988) (defendant forfeits his right to present a witness when he willfully refrains from providing discovery on a timely basis in order to obtain a tactical advantage at trial); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (defendant forfeits his right to suppress a voluntary confession taken in violation of *Miranda* when he exploits the suppression ruling by taking the stand and testifying inconsistently with the confession).

*Reynolds* makes clear that this same conception of equity—one protecting against intentional attempts to thwart, disrupt, or manipulate criminal proceedings—governs forfeiture doctrine in the

context of the right to confrontation. A defendant who procures or contrives to arrange for an adverse witness's absence, specifically intending to subvert the truth-seeking process, is rightly prevented by equitable principles from taking advantage of that wrong by asserting his confrontation rights. But confrontation rights cannot be subject to forfeiture simply because of the defendant's wrongdoing for which he is being tried; forfeiture is appropriate only if he has actually engaged in specific conduct to manipulate the trial process.

When the witness is "absent by [defendant's] procurement," evidence of that person's prior hearsay statements may come in because the defendant "is in no condition to assert that his constitutional rights have been violated." *Reynolds*, 98 U.S. at 158. It is this particular wrongful conduct, which derogates from the accuracy of the trial process, that the *Reynolds* court was referring to when it invoked the principle of equity: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong ...." *Id.* at 159. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Davis*, 126 S. Ct. at 2280 (emphasis in original.)

The very concern expressed in *Reynolds* for protecting the integrity of the trial process requires a narrow conception of the forfeiture doctrine, for "denial or significant diminution [of Confrontation

Clause rights] calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citation omitted). Confrontation rights can be forfeited not as an additional penalty for alleged wrongdoing but only where the defendant has specifically interfered with an effective trial process.

When a defendant invokes his confrontation right with respect to a potential witness whom he killed for purely personal reasons, he does not benefit from the wrongful killing of that witness in the same way as a defendant who has caused the absence of a witness for the purpose of preventing testimony at trial. In the witness-tampering context, benefit follows design: the defendant seeks to benefit from the acts he has taken to arrange for the witness's unavailability. Under the California court's broad forfeiture doctrine, however, there is no requirement of any design at all to benefit in an anticipated trial from the killing of a victim. Of course, there is a causal connection between the defendant's killing of the witness and the witness's absence at trial, but factual causation is not sufficient because forfeiture requires a specific intent to interfere with the trial process itself.

The California court is fundamentally mistaken in treating *Crawford*'s formulation of the confrontation right as a "benefit." J.A. 54-55. The Confrontation Clause provides the "bedrock procedural guarantee" that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford,* 541 U.S. at 42 (quoting Amdt. 6). A defendant's right to confront and cross-examine the witnesses against him is not a "benefit"

that accrues to a defendant as a result of his crime, it is a central procedural safeguard whose "very mission [is] to advance the accuracy of the truth-determining process in criminal trials." *Tennessee v. Street,* 471 U.S. 409, 415 (1985) (citing *Dutton v. Evans,* 400 U.S. 74, 89 (1970)) (internal quotation marks omitted)). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

Except where the defendant engages in conduct specifically designed to undermine the integrity of the trial process, the defendant's confrontation rights should be unimpaired. In this context, the California Supreme Court's concern about a defendant benefiting from wrongdoing is entirely misplaced. The defendant "benefits" only in the sense that the system does not take away his core rights as the accused. The state must prove its case without relying on testimonial hearsay statements that are not capable of being tested in the "crucible of cross-examination." *Crawford*, 541 U.S. at 61. That central teaching of *Crawford* should be a source of pride in our constitutional order, not a reason for expanding the forfeiture rule in a wholly unprecedented manner.

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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February 20, 2008

# RESPONDENT'S BRIEF

(16)

No. 07-6053 5-19-08

IN THE

# Supreme Court of the United States

**DWAYNE GILES, *Petitioner,***

**v.**

**STATE OF CALIFORNIA**

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

## RESPONDENT'S BRIEF ON THE MERITS


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## QUESTION PRESENTED

Whether a defendant who murders a witness may complain that the witness is unavailable for cross-examination.

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## STATEMENT OF THE CASE

1. The State of California charged petitioner Giles with the first-degree murder of Brenda Avie. The prosecution produced witnesses who testified about the following events on the night of the crime and afterward:

a. Petitioner was "socializing" with others outside his grandmother's house on the evening of September 29, 2002. His niece was there, as was his girlfriend, Brenda Avie. After petitioner's niece had gone into the house for a while, she suddenly heard Ms. Avie exclaim "Granny!" and the sound of several gunshots. Petitioner's niece and his grandmother ran outside. Ms. Avie was lying on the ground and bleeding. Petitioner, a few feet away, was holding a nine-millimeter pistol. J.A. 32-33.

Petitioner's grandmother took the gun from him and called "911." At petitioner's request, his niece drove him away in her car. After several blocks, however, petitioner jumped from the car and ran away. J.A. 33.

The police arrived. They retrieved the gun from petitioner's grandmother. But they found no other weapon or purse near Ms. Avie. J.A. 34.

An autopsy revealed that Ms. Avie had been shot six times. Each of two separate gunshot wounds—perforations of her aorta and her liver—was serious enough alone to kill her. The location of one bullet wound indicated that she had been holding up her hand at the time of one gunshot. The location of another indicated that she had turned to her side. The location of a third indicated that she had been shot while lying on the ground. J.A. 33-34.

At the end of its case-in-chief, the prosecution called police officer Stephen Kotsinadelis to testify about a previous incident—a few weeks earlier, on September 5—in which the officer had taken a report from Ms. Avie describing domestic violence inflicted on her by petitioner. Petitioner objected that the evidence was inadmissible

under state law. But the trial judge allowed the testimony as admissible hearsay under California Evidence Code § 1370. J.A. 15, 35-36.

Officer Kotsinadelis testified that petitioner, appearing agitated, had answered at the door and allowed the officer and his partner to enter. Ms. Avie was sitting on the bed, crying. Officer Kotsinadelis interviewed her while his partner remained with petitioner in a different room. Ms. Avie said that she had been talking on the phone with a friend when petitioner became angry and accused them of having an affair. Then, she said, petitioner grabbed her by the shirt, lifted her off the floor, and began to choke her. She broke free and fell to the floor, but petitioner climbed on top of her and punched her in the face and head. Petitioner, she continued, opened a folding knife, held it about three feet from her, and said, "If I catch you fucking around, I'll kill you." Officer Kotsinadelis saw no marks on Ms. Avie; but he was able to feel a bump on her head. J.A. 35-36.

b. Petitioner relied on self-defense. He testified that, even though they had a relationship that included living together from 1998 to 2002, Ms. Avie once had attacked him with a knife, had confronted other women in his presence with a knife, and had told petitioner she once had shot a man during an argument. J.A. 34. Other defense witness testified that they had been subjected to violence, threats, and harassment by Ms. Avie. R.T. 698-704, 734-741.

According to petitioner, Ms. Avie had phoned him at his grandmother's house and told him she was coming over to kill his new girlfriend, Tameta Munks. After petitioner sent Ms. Munks away, Ms. Avie arrived and this time threatened to kill both of them. Petitioner retrieved a gun he knew to be loaded, and disengaged its safety button so it would be ready to fire. Ms. Avie followed petitioner, he

testified, as he retreated down the driveway; in the darkness, he could not tell if she had a weapon. Although claiming that he had lowered his head and closed his eyes, petitioner acknowledged in his testimony that he pointed the gun at Ms. Avie, fired it, and kept firing until it was empty. J.A. 34-35. To continue firing the gun petitioner used, one would have to squeeze the trigger anew after each shot. R.T. 338-343.

c. The jury found petitioner guilty as charged of first-degree murder by means of a firearm. The judge sentenced him to state prison for a term of fifty years to life. J.A. 11.

2. Petitioner appealed to the California Court of Appeal. J.A. 1. While the appeal was pending, this Court issued its decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), holding that the Confrontation Clause applied to a witness' "testimonial" statements, but also "accepting" that a defendant may be held to forfeit his confrontation right if his own wrongdoing made the witness unavailable to testify at the trial. After the parties filed briefs on *Crawford*'s effect on the case, the Court of Appeal rejected petitioner's confrontation claim and affirmed his conviction. J.A. 2, 18-27, 30. The court held that petitioner had forfeited his confrontation claim by wrongdoing when he killed Ms. Avie, regardless of whether his intent was to keep her from testifying. J.A. 18-23.

3. Petitioner sought and obtained review in the California Supreme Court. J.A. 4-5. The California Supreme Court affirmed petitioner's conviction. J.A. 66. It first set out this issue: "Defendant acknowledges that the forfeiture by wrongdoing doctrine is an exception to the Confrontation Clause, but argues that it is inapplicable because the defendant did not kill the victim with the intent of preventing her testimony at a pending or potential trial." J.A. 39. The court reasoned that *Crawford* and *Reynolds*

v. *United States*, 98 U.S. 145 (1879), had treated the doctrine as a "forfeiture" rule based on the principles that no one should profit from his wrongdoing and that no one may complain about what he himself has caused. J.A. 52. Thus, "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." *Id.* Conversely, the state court explained, petitioner's proffered "intent" argument was based on a flawed theory of "waiver" of rights rather than forfeiture. J.A. 53.

The California Supreme Court recognized that forfeiture principles extend beyond tampering cases to cases "in which an intent to silence element is missing." J.A. 54. This was such a case: as the state appellate court had explained, "a defendant whose intentional criminal act renders a witness unavailable benefits even if it was not his intent." *Id.* The state supreme court further explained that application of the rule in such cases, without requiring proof of a motive to tamper, protects the "integrity of court proceedings." J.A. 55. And it noted that petitioner himself had introduced evidence of Ms. Avie's out-of-court statements to portray her as violent, aggressive, and volatile. J.A. 56. Pointing out that petitioner "no longer disputes" the point, the state court further concluded that the doctrine applies in a case where the wrongdoing is the same as the offense for which the defendant is on trial. J.A. 59.

The California Supreme Court set out limitations on its holding. There must be a showing of "genuine" unavailability that was "caused" by the defendant's "intentional criminal act." J.A. 64. The State must prove the wrongdoing by a "preponderance of the evidence"; and that proof may not consist solely of the unavailable declarant's hearsay but instead must be corroborated by "independent evidence." J.A. 64. Further, the forfeiture bars only the defendant's objections based on the lack of

confrontation of the witness he prevented from appearing. The hearsay statement still must qualify as an exception to the state-law hearsay rule and other rules of evidence. J.A. 64.

## SUMMARY OF ARGUMENT

I. When the defendant has murdered the witness, he may not still insist on his "right" to cross-examine her at his trial. It makes no difference whether his motive for killing her was to make her unavailable to testify against him in court.

a. It is not only irrepressible human intuition that leads to the conclusion that such serious misconduct by the defendant is inimical to his confrontation right. The ancient maxim that "no one may profit from his wrongdoing" provides the legal basis for the conclusion that a defendant who murders the witness forfeits his trial right to confront her about her out-of-court statement. And the principles that traditionally have animated the confrontation-forfeiture doctrine—equitable considerations of fairness, necessity, and the integrity of the truth-finding function of the criminal trial—operate with compelling force where the defendant has murdered the witness.

Murder is the ultimate act of "unclean hands." Of all forms of wrongdoing, moreover, homicide is the one that makes it most clear to the defendant that his victim will not be available for any future proceeding. Equally fundamental, it would damage the integrity of the criminal justice system to allow the killer to exclude his victim's testimony in his murder prosecution. The loss of the victim's evidence subverts the truth-finding mission of the courts. And excluding the victim's out-of-court testimony would prejudice even further the interests of the State—the party already deprived of the victim's live testimony by the defendant's wrongdoing. Such

wrongdoing causes the same damage in any given case, whether or not the defendant might have set out specifically to tamper with the proceeding.

b. Dating back to the era when the Confrontation Clause was adopted, equitable principles underlying the forfeiture doctrine were accepted, in English cases such as *Lord Morley's Case* in 1666, as the explanation for admitting the statements of witnesses whom the defendant wrongfully had kept away from his trial. Later, the same equitable considerations provided the acknowledged justification for the "dying declarations" rule. That rule allowed into evidence at the defendant's murder trial the un-sworn and un-cross-examined statements of the homicide victim—regardless of whether the defendant had struck the fatal blow for the purpose of tampering with a prospective witness. In those essential respects, the dying declaration bears a "striking resemblance" to the statements admitted in this case without cross-examination and regardless of any witness-tampering motive on the part of petitioner.

c. This Court has explicitly endorsed a forfeiture doctrine that permits rejection of a defendant's confrontation claim on equitable grounds when he seeks a windfall from his wrongdoing. It also has credited the validity of the dying-declarations rule—a rule that specially admits the victim's statements in the defendant's murder trial regardless of the motive for the murder. Further, this Court's precedents in a variety of other settings demonstrate that a defendant may be precluded from asserting a constitutional claim precisely because of conduct inimical to the right he asserts and regardless of his original motive or subjective understanding of his conduct's implications.

d. Even if the defendant's murder of the witness did not virtually exhaust the forfeiture calculus, it still would

serve no legitimate purpose to inject a "motive" inquiry into this a murder case. The defendant would reap the same benefit from his wrongdoing regardless of his motive. The impairment of the integrity of the trial would be accomplished regardless of the defendant's motive. The prejudice to the State would remain the same regardless of his motive too.

Petitioner's argument for a motive requirement seems in part to be an artificial one of simply cutting down the number of instances in which defendants will be prevented from suppressing evidence of their victims' statements. Wherever forfeiture is justified, however, it should be invoked. Petitioner's other professed concern, that the forfeiture doctrine might be misapplied in other cases, is not at issue in this defendant-murders-victim case. Besides, long-standing procedures remain in place to protect against invocation of the forfeiture rule where the witness is not truly unavailable and to protect against the admissibility of unreliable evidence even where the defendant has forfeited his confrontation right.

II. Unavailable, also, are any arguments that oath and a prior opportunity for cross-examination remain prerequisites even where the defendant forfeits his right to confrontation at trial. No such objections were raised in the certiorari petition. Validating any such objection would deprive the doctrine of any effect. Finally, then-existing statutory and hearsay rules of the Framing era, on which petitioner relies, do not limit the scope of the forfeiture doctrine.

Precisely because he intentionally killed his victim in this case, and made her unavailable to testify in his murder trial, petitioner forfeited his right to confront her. The California Supreme Court correctly admitted evidence of the victim's statement over his meritless confrontation objection.

## ARGUMENT

### I.

### A Defendant Who Murders a Witness May Not Complain That the Witness Is Unavailable for Cross-Examination

#### Introduction.

Petitioner sought to exclude from his murder trial evidence of statements Brenda Avie made to the police three weeks before petitioner killed her. Petitioner claimed that admitting the statements violated his Confrontation Clause right because Ms. Avie was dead and thus not available to be cross-examined about them. Relying on this Court's acceptance of the "forfeiture by wrongdoing" doctrine, the state supreme court ruled that petitioner had forfeited his confrontation claim when he killed the witness and caused her absence from the trial.

Petitioner contends that the forfeiture doctrine applies, if at all, only in cases where the defendant's wrongdoing was motivated by an intention to keep the witness from testifying. Here, it is acknowledged, that was not shown to be the case. But his contention must be rejected.

The traditional justifications for admitting an absent witness' statement without confrontation are most cogent where the defendant caused the witness' absence by intentionally killing her. Framing-era law and this Court's precedents therefore recognized the admissibility in the homicide trial of the murder victim's un-cross-examined statements, and did so where the murder would not have been motivated by any desire to "tamper" with a witness.

**A. Equitable considerations of fairness, necessity, and the integrity of the trial provide the historical foundation for the forfeiture-by-wrongdoing doctrine and govern its application in this case.**

Where the defendant seeks to exploit his victim's absence from the trial, the forfeiture-by-wrongdoing doctrine vindicates the ancient legal maxim that no one may take advantage of his wrongdoing. On the question of forfeiture of confrontation, the maxim requires the court to consider the demands of fundamental fairness, the necessities of the case, and the integrity of the truth-finding function of criminal trials. Here, those considerations combine to dictate that petitioner must not be allowed to rely on the absence of the woman he killed as a reason for excluding her out-of-court statements in his murder prosecution.

1. In *Crawford* v. *Washington*, 547 U.S. 813, and in *Davis* v. *Washington*, 547 U.S. 813 (2006), this Court addressed the issue of whether the defendant may invoke the Confrontation Clause to require a court to exclude evidence of an absent witness' out-of-court statements where the defendant himself had wrongfully caused the witness' absence from the trial. This Court reiterated in those cases that it "accepts" the doctrine of "forfeiture by wrongdoing" that "extinguishes confrontation claims on essentially equitable grounds." *Davis*, at 833; *Crawford*, at 62. See *Snyder* v. *Massachusetts*, 291 U.S. 97, 106 (1934) ("no doubt" that the right of confrontation may be lost by misconduct); see, e.g., *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970). "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation." *Davis*, at 833.

*Crawford* traced its acceptance of the doctrine back more than a hundred years, to *Reynolds* v. *United States*, 98 U.S. 145. *Reynolds*, in turn, traced the doctrine to

England and the seminal seventeenth-century decision in *Lord Morley's Case*, 6 How. St. Tr. 869 (H.L. 1666). *Reynolds* explained the operation and the theoretical justifications for the forfeiture-of-confrontation doctrine:

> [T]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; *but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to support the place of that which has kept away. The Constitution does not guarantee an accused person against the legitimate consequence of his wrongful acts.* It grants him the privilege of being confronted with the witnesses against him; but *if he voluntarily keeps the witnesses away, he cannot insist on his privilege.* If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, *he is in no condition to assert that his constitutional rights have been violated.*

98 U.S. at 158 (emphasis added). *Reynolds* specifically identified the historic legal maxim that supports the doctrine:

> *The rule has its foundation in the maxim that no one should be permitted to take advantage of his own wrong*; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. *It is the outgrowth of a maxim based on the principles of common honesty*, and, if properly administered, can harm no one.

*Id.*, at 159 (emphasis added).

The forfeiture doctrine recognized in *Crawford* and *Reynolds* thus may be explained in two overlapping ways. First, the Constitution does not "guarantee an accused

protection against the legitimate consequences" of his misconduct. 98 U.S. at 159. Second—and more powerfully—it would be intolerable if the defendant were allowed to profit in court from his wrongdoing.

The equitable maxim that no man may profit from his own wrong was long a part of common law. H. BROOM, A SELECTION OF LEGAL MAXIMS 202, 204 (3d ed. 1852); 1 HALE, PLEAS OF THE CROWN 482 (1726). It carried over to America too: it is "[d]eeply rooted in our jurisprudence." *Glus* v. *Brooklyn E. District Terminal*, 359 U.S. 231, 232-233 (1959). See *McDaniel* v. *State*, 16 Miss. 401 (1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the [dying declaration], when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death."); see also *State* v. *Houser*, 26 Mo. 431 (1858) (exclusion of dying declarations would be "abhorrent" to a "sense of justice.")

3. The forfeiture doctrine and its underlying principles serve other important policies consistent with the Sixth Amendment. As recognized by this Court, and by the California Supreme Court, courts need not "acquiesce" when the defendant acts in "ways that destroy the integrity of the criminal-trial system." *Davis*, 547 U.S. at 833. The forfeiture doctrine allows the court to protect the integrity of the trial. *Giles*, J.A. 57; see *id.*

The aspiration of fully developing all relevant facts is fundamental to the criminal justice system. *United States* v. *Nixon*, 418 U.S. 603, 709 (1974). The forfeiture-by-wrongdoing doctrine promotes the truth-seeking function of the trial by preventing the defendant from suppressing important, and often crucial, testimony of a witness when the defendant's own misconduct has made confrontation impossible. Here, for example, Brenda Avie's statement to the police provided significant circumstantial evidence on

the question of whether the charged homicide, as to which no eyewitnesses were available to the State, had been committed unlawfully and with premeditated intent to kill. See, *e.g.*, *United States* v. *Garcia-Meza*, 403 F.3d 364, 365-366 (6th Cir. 2005). Where the defendant's misconduct frustrates cross-examination, the Confrontation Clause does not require courts to ignore "the necessities of the case," *Mattox* v. *United States*, 156 U.S. 237, 243 (1895), by excluding the victim's statements and permitting the defendant to present a one-sided account of events.

Consonant with its underlying equitable principles, the doctrine further protects the integrity of court proceedings by avoiding the prejudice the State would suffer if the defendant's wrongdoing were allowed to entirely deprive it of the witness' testimony. It also mitigates the prejudice the defendant causes when he wrongly deprives the State of the witness' testimony live and in court. As this Court has observed in the context of a confrontation claim, "[J]ustice, though due the accused, is due to the accuser too." *Snyder* v. *Massachusetts*, 291 U.S. at 122.

**B. The doctrine's equitable principles, and their application to witness-killing cases throughout history and in this Court, dictate that the victim's statements are admissible over the defendant's confrontation objection if he murdered her.**

These equitable justifications for the confrontation-forfeiture doctrine—fairness, necessity, integrity of the proceedings—no doubt permit the court to consider multiple factors. In terms of the basic conundrum—how to determine whether the consequences of the defendant's misconduct support the conclusion that he has forfeited his confrontation right—the most logical equitable considerations are the seriousness of the defendant's wrongdoing, the apparent predictability of the victim's

absence, and the seriousness of the charged crime. Other considerations might include the defendant's motive and the nature of the victim's evidence. The balance of such factors in an ambiguous case might be a delicate one.

But where the defendant intentionally kills the witness, the answer becomes clear. Murder falls in the worst class of wrongdoing and "unclean hands." The resultant unavailability of the witness for testifying in any future case will be obvious to all, including the defendant in committing the homicide. The murder prosecution itself is in the first rank among the most serious ones the State brings. The notion of allowing the killer to silence the victim on account of her absence in such cases is worse than unpalatable. It is intolerable.

Anglo-American legal history demonstrates that, in such cases and for those reasons, the justifications for applying the forfeiture doctrine become most powerful in the case where the defendant intentionally kills the witness. As this Court discerned in *Reynolds*, perhaps the earliest expression of the rationale for admitting unsworn and un-cross-examined statements where the defendant killed the witness extends back to the opinion in *Lord Morley's Case* in 1666. 98 U.S. at 159. A further manifestation of the rationale is the historic dying-declarations rule, one treated with clear approval in this Court's precedents. Consisting of the murder victim's unsworn statements and used against the defendant at his murder trial despite a want of confrontation and outside any conceivable witness-tampering context, dying-declarations bear a "striking resemblance," see *Davis*, 547 U.S. at 830; *Crawford*, 541 U.S. at 52, to the statements admitted against petitioner in this case.

***1. The defendant's motive to "tamper" is insignificant in applying the forfeiture-by-wrongdoing doctrine to admit the murder victim's testimony against her killer.***

a. The equity-based legal principle that no one may profit from his wrongdoing fits the facts of this case without regard to whether petitioner had a specific witness-tampering purpose when he killed Brenda Avie. To sustain petitioner's confrontation objection to evidence of Ms. Avie's statements would be to allow petitioner to benefit, by exclusion of the evidence, from the wrongdoing that caused her absence from the trial and that provided petitioner with the very grounds for his objection. He would be receiving that benefit as an exploitation of his own misconduct, whatever his state of mind at the time of the homicide. Indeed, this Court has applied the maxim without regard to whether a killer originally intended the benefit he later claims on account of his own act of homicide. See, *e.g.*, *Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886).

This Court in *Davis*, commenting that domestic-violence cases are especially susceptible to the commission of wrongdoing that keeps the victim from testifying, recognized that "[w]hen this occurs, the Confrontation Clause gives the defendant a *windfall*." 547 U.S. at 833 (emphasis added). The forfeiture doctrine prevents the defendant from cashing that particular check: "[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation." *Id.*

As *Reynolds* indicated, the confrontation-forfeiture issue may be conceived in slightly different terms as a question of fundamental incompatibility between the defendant's misconduct and his claim of right. *Reynolds*, 98 U.S. at 159; see R. Friedman, *Confrontation and the Definition of Chutzpah*, 31 ISRAEL L. REV. 506. Whether

petitioner's conduct is viewed as an intolerable attempt to profit from wrongdoing, or as an untenable effort to have it both ways by seeking the very kind of legal protection his own actions have made impossible, extinguishment of petitioner's right follows inevitably. Killing Ms. Avie and making her unavailable for trial was absolutely inimical to petitioner's claim for cross-examination. See *United States* v. *White*, 116 F.3d 903, 910 (D.C. Cir. 1997); *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) ("A defendant cannot prefer the law's preference [for live testimony rather than out-of-court statements] and profit from it . . . while repudiating that preference by creating the condition that prevents it").

b. The same conclusion holds true in light of the forfeiture doctrine's concerns about judicial integrity, including fairness to the State as the opposing litigant. Regardless of the defendant's specific motive, the damage inflicted on the trial's truth-seeking function by the loss of the evidence in any particular case, and its one-sided replacement, remains the same. Regardless of the motive, the harm to the State also remains the same so long as the substance of the statement remains excluded on account of the witness' death.

c. Petitioner's suggestion that he would not "benefit" from excluding his victim's testimony on account of her absence (Pet. Br. 47) is simply not true. He reasons that "benefit follows design." But "benefit" follows more directly from the proximate conduct that makes it happen. Suppressing the victim's testimonial statements obviously would be a benefit to petitioner, else he would not be seeking it. That benefit follows from the inevitable and necessary consequences of his own act of murder.

Application of the forfeiture doctrine does not punish the defendant for his wrongdoing; the penal sanction takes care of that if need be. The forfeiture doctrine,

extinguishing confrontation claims, instead counters the wrongdoing's effects at trial. The killer, in objecting at trial, means to affect the proceedings and seeks an advantage on account of the ensuing absence of his victim. That purpose arises inevitably in all forfeiture cases; it is just a matter of time. Still, the defendant's trial objection is the wrongful act that causes the forfeiture. The wrongful act that renders the objection unmeritorious is the homicide. It is the seriousness of the crime and the evident predictability of the victim's absence at trial that drives the forfeiture ruling in this case, not the defendant's specific purpose at any particular point in time.

The forfeiture context is unlike the situation where the court honors a meritorious constitutional objection by suppressing a coerced confession or excluding the fruits of an unconstitutional search. See *Davis*, at 833. In obtaining neither ruling does the defendant ultimately improve his legal position on account of his wrongdoing.

d. If wrongdoing may override confrontation—and *Crawford* and *Davis* assure that it can—it must be seen to do so in cases where the defendant intentionally kills the witness. It is not an accident that petitioner is hard-pressed to cite a modern forfeiture case in which the murderer of the witness was held on appeal to retain his confrontation rights with respect to excluding her statements from his trial. Even courts that generally limit forfeiture to cases where the wrongdoing was motivated by witness tampering have also recognized that the rule well might be different in a case where the defendant's wrongdoing is that of killing the witness. See, e.g., *People* v. *Stechly*, 870 N.E.2d 333, 352-353 (Ill. 2007); *People* v. *Moreno*, 160 P.3d 242, 246 (Colo. 2007).

2. ***Framing-era legal principles exemplified in* Lord Morley's Case *and the dying-declaration rule show historical equitable bases for admitting the witness' un-confronted statements where the defendant killed her, regardless whether the motive for the murder was to tamper with a proceeding.***

As a basic matter of logic and equity, the defendant's murder of the witness presents the strongest case for admitting the victim's out-of-court statements against him. The same judgment has been made by history. *Lord Morley's Case* in ancient law presents one example of equitable considerations in action where the defendant detains or kills a witness. The dying declarations rule, traditionally allowing evidence of the homicide victim's statements against the accused killer without cross-examination even where the homicide occurred outside any "witness tampering" context, provides another example compelling in its own right.

a. *Lord Morley's Case.*

i. *Lord Morley's Case*, 6 St. Tr. 770 (1666), is recognized as a progenitor of the forfeiture-by-wrongdoing confrontation doctrine. See *Reynolds*, 98 U.S. at 158. Under the rule that developed from *Lord Morley's Case*, evidence of the witness' out-of-court and un-confronted coroner's examination was admissible in the defendant's murder case where the witness' absence was caused by the "means or procurement" of the prisoner. See *Harrison's Case*, 12 St. Tr. 833 (1692), and *Fenwick's Case*, 13 How. St. Tr. 538 (1696). In that era, the defendant would not likely have been present at such coroner's examinations to confront the witnesses. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (1802); see *Rex* v. *Eriswell*, 100 Eng.Rep. 815, 824 (1790).

Framing-era and post-Framing-era authorities gave distinct equitable justifications for the admissibility rule triggered in homicide cases where the witness was dead or the defendant kept the witness away. Gilbert's treatise explained that, "in these cases," the examinations amounted to the "utmost evidence" because the witness was dead; and that "so much more are such examinations to be read at trial when the witness is detained and kept back from appearing by the means and procurement of the prisoner," because the defendant "shall *never be permitted* to shelter himself by such evil practices on the witness, that being to give him advantage of his own wrong." GILBERT, THE LAW OF EVIDENCE 99-100 (1754) (emphasis added); PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 40-41 (1802). Referring to Taylor's treatise on evidence, similarly, the court in *Regina* v. *Scaife*, 117 Eng. Rep. 1271 (1851), identified support for the rule in the principle that "justice . . . will not permit a party to take advantage of his own wrong." *Id.* at 242; see also 2 HAWKINS, PLEAS OF THE CROWN (1716) (citing coroner's status). As this Court indicated in *Crawford*, 541 U.S. at 47, n.2, it cannot confidently be said that English law at the time the Sixth Amendment was proposed and adopted in 1789-1791 had curtailed the continuing admissibility of coroner's examinations such as those at issue in *Lord Morley's Case* and *Harrison's Case*. See T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 491-492 (2d ed. 1828); PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 41 (1802).

ii. Petitioner examines nineteenth century dictionary definitions and treatises in a vain effort to prove that the word "procure," which was used in *Lord Morley's Case* in describing the kind of absence-producing wrongdoing that triggered forfeiture, connotes a specific motive to tamper. (Pet. Br. 26 et seq.)

A basic flaw in petitioner's method is that it ignores the fact that *Lord Morley's Case* spoke not only of "procurement" but also of whether the witness was "detained by the *means*" of the prisoner. 6 How. St. Tr. at 770-771 (emphasis added). Petitioner in his brief understandably does not contend that a simple reference to "means" specially connotes "specific intent" and "deliberate design." The Oxford English Dictionary (Compact ed. 1971) defines "means" variously in terms of "proximate cause," "instrumentality," connoting an event "owing to" or "in consequence of" something. When the defendant's murder of a witness causes her absence at trial, she indeed has been made absent "by means . . . of the prisoner." Another flaw is that even petitioner's cited definition of "procure" includes "to cause"; "to bring about"; and "to cause to come on." None of these denotes a specific-intent design rather than bare physical causation. Petitioner's effort is strained and tendentious. Regardless, the important point is, instead, that the common law recognized the principles that underlie the forfeiture doctrine identified by this Court in *Reynolds* and *Crawford*.

Petitioner says that Rule 804(b)(6) of the Federal Rules of Evidence carries on the alleged tradition of inferring that to "procure" inherently involves a deliberate intention to carry out a plan. (Pet. Br. 26.) But the language of the rule suggests the opposite. It speaks of whether the defendant in his wrongdoing "intended to, and did, procure" the witness' unavailability. If it were so clear that "procure" clearly denotes specific intent, the added "intended to" language would not have been needed.

iii. *Lord Morley's Case* gave rise to a rule allowing into evidence un-confronted statements of a witness in a murder prosecution where the defendant's wrongdoing had caused the witness' absence. The principles that dictated

that rule pertain to the case at bar, which also involves the same conundrum of a defendant seeking to suppress on lack-of-confrontation grounds the statements of a victim killed or wrongfully kept away by the defendant himself.

*b. Dying declarations.*

i. The DNA of the forfeiture-by-wrongdoing doctrine can also be found in another ancestor: the dying-declaration rule that developed as part of criminal law at the time the Sixth Amendment was ratified. E.g., *Rex* v. *Woodcock*, 168 Eng. Rep. 352 (1789); *Rex* v. *Reason*, 16 How. St. Tr. 1, 24-38 (1721). The dying-declaration rule operated to admit in a murder prosecution—subject to certain criteria that did not pertain to compliance with any cross-examination process—a witness' out-of-court and uncross-examined statements against the defendant who killed her. See *Crawford*, 541 U.S. at 56, n.6; S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 186 (1842). And, obviously, the fatal blow that would prompt a victim's dying declaration could be struck for myriad other reasons than the unlikely one of "witness tampering." In these essential ways, dying declarations bear a "striking resemblance" to the statements at issue in this case. That resemblance supports the conclusion that the admission of the challenged statements in this case comported with the Sixth Amendment. See *Davis*, 547 U.S. at 830.

ii. Further, the equitable justifications for admitting dying-declarations without confrontation would coincide with the justifications for dispensing with confrontation under this Court's forfeiture doctrine in virtually any case where the defendant seeks to exclude the statements of a witness he intentionally killed. The equity-based rationale that supported the admissibility of dying declarations at common law was that of necessity. "Evidence of this sort is admissible in this case on the fullest necessity; for it

often happens that there is no third person present to be an eyewitness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of." 1 E. EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803); accord, *State* v. *Ferguson*, 20 S.C.L. (2 Hill) 619, 624 (S.C. App. 1835); cf. *Omychund* v. *Barker*, 26 Eng. Rep. 15, 31 (1744). To exclude the dying declaration would be "abhorrent to . . . justice." *State* v. *Houser*, 26 Mo. 431 (1858); see also *State* v. *Thomas*, 64 N.C. 74 (1870) (rule justified by maxim that "no man shall take advantage of his own wrong.").

As recognized in early American cases, the seriousness of the crime of murder also played a significant role. See *Wilson* v. *Boerem*, 15 Johns Cas. 286, 291 (N.Y. Sup. Ct. 1818); see also *Jackson* v. *Kniffen*, 2 Johns Cas. 31, 35 (N.Y. Sup. Ct. 1806) (rule limited to "great crimes" where "public justice may otherwise . . . be defeated.") "[T]he exception stands on the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice." *McDaniel* v. *State*, 16 Miss. 401 ("It is only permitted in cases of homicide, and the exception stands upon the ground of the public necessity of preserving the lives of the community, by bringing man-slayers to justice."); *Houser*, 26 Mo. 431; S. GREENLEAF, TREATISE ON EVIDENCE 187.

iii. Of special pertinence to petitioner's case, the dying-declarations rule applied peculiarly to allow admission of the victim's statements against the wrongdoing defendant in the criminal homicide case. See 2 WM. HAWKINS, PLEAS OF THE CROWN 619 (Leach ed. 1788.) That limitation corroborates the inference that a motivating concern for the rule was the fact that it was the defendant in particular who had killed the witness. See *McDaniel* v. *State*, 16 Miss. 401 ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner

himself has been the guilty instrument of preventing the production of the witness, by causing his death."). Given these justifications, the dying-declarations rule may be classified as a species of a forfeiture-by-wrongdoing doctrine.

iv. Petitioner and amicus NACDL contend that dying-declarations historically were admitted only because they were especially reliable and not because the defendant was thought to have forfeited his confrontation rights by killing the witness. (Pet. Br. 15; NACDL Br. 16.) But their "reliability" answer begs the question. As this Court explained in *Crawford*, there was "no general reliability exception to the common-law rule" of confrontation. 541 U.S. at 61. The common-law principle, as enshrined in the Confrontation Clause, was a procedural one commanding "not that evidence be reliable, but that it be assessed in a particular way: by testing in the crucible of cross-examination." *Id.*

Instead, as just explained, the admissibility of dying-declarations without confrontation depended on other reasons—the necessity for the evidence, the fact that the defendant had "gotten rid of" the witness, and the importance of murder prosecutions. Early American treatises, indeed, noted that flaws in the asserted "reliability" rationale left the reasoned basis for the exception "to stand only upon the ground of" the equitable concerns of fairness and necessity. See GREENLEAF, TREATISE ON EVIDENCE 187 [§ 156]; J. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE, vol. 1, 472 [§ 501] (1848). If reliability were the touchstone for the admission of dying declarations, the courts would not have limited the rule to criminal cases at all. Instead, early American courts identified the absence of necessity as the reason for declining to apply the rule to civil cases despite the reliability of the evidence. See *Wilson*, 15 Johns Cas. at

291; *Jackson*, 2 Johns Cas. 31.

In basing admissibility of the victim's statements against her killer on those equitable considerations, the dying-declarations rule illuminates the same historical judgment about confrontation that is at issue in petitioner's case. It was then—as it is now—intolerable and unjust to allow the defendant to exploit his killing of the witness by citing her absence as the reason for excluding her statements at the murder trial. Cf. *Lord Audley's Case*, 123 Eng. Rep. 1140 (1631) (overriding marital privilege where wife is victim of husband's serious crime).

Petitioner and NACDL point out that Brenda Avie's statement went beyond the scope of a dying declaration in that the latter were statements made in apprehension of death and describing the culprit's infliction of the fatal wound. (Pet. Br. 15; NACDL Br. 22.) But the cited differences are merely hearsay matters. See GREENLEAF, TREATISE ON EVIDENCE 186. They are not confrontation matters, for they have nothing to do with adherence to a cross-examination procedure. As this Court in *Crawford* made clear, the cross-examination-process mandate of the Sixth Amendment is separate from mere hearsay concerns. 541 U.S. at 60-62. The dying declarations rule reflects that dichotomy. It retained some hearsay limitations, without relaxing them entirely. See EAST, PLEAS OF THE CROWN 353-354. But it fully dispensed with confrontation. Regardless of any variations in their hearsay dimensions, dying declarations bear "striking similarities" to Brenda Avie's statements in this case insofar as they both reflect the same equitable judgment overriding the confrontation rights of the killer.

The hearsay–confrontation distinction explains away petitioner's and NACDL's argument that equitable principles could not have worked to extinguish confrontation concerns in common law without rendering

the dying-declarations rule "superfluous." (Pet. Br. 17; NACDL Br. 16-25.) The dying-declarations rule dispensed with confrontation, but it did not automatically admit the victim's statements just because confrontation had been accounted for. So it is not surprising that NACDL can cite pre-Framing and Framing-era cases where the prosecutor failed to secure admission of a victim's statement under a dying-declaration theory but then never offered the statement under the theory that the defendant had forfeited his confrontation rights. (NACDL Br. 17-22.) Where a homicide victim's statement failed under the dying-declaration rule's hearsay standards anyway, any confrontation-forfeiture argument would have been moot.

The same hearsay-confrontation distinction, in fact, played an important role in petitioner's own case under California law. In the state appeal, the California Supreme Court held that petitioner had forfeited his federal constitutional confrontation right by wrongdoing. But, on account of other State policies promoted in its Evidence Code, petitioner was held *not* to have forfeited his right to insist that the challenged evidence nevertheless meet the reliability criteria embodied in the Evidence Code section 1370 hearsay exception for statements such as those Brenda Avie made to the police when petitioner beat her up a few weeks before murdering her. *Giles*, J.A. 54.

v. Petitioner cites *Rex* v. *Woodcock*, 168 Eng. Rep. 352, and *Rex* v. *Dingler*, 168 Eng. Rep. 383 (1791), for the proposition that, at the time of the Framing, "the absence-procured-by-defendant doctrine was restricted to properly taken Marian examinations." He argues that any "forfeiture doctrine" therefore would have admitted only statements that otherwise complied with the confrontation opportunity that he says characterized the Marian examinations of the time. (Pet. Br. 18-19.) The *Woodcock* court's actual Marian-examination ruling, however, seems

to have been based on the absence of an effective judicial oath or the absence of an opportunity for what the court called "contradiction." See argument II, *post*. More important, *Woodcock* recognized that the victim's statements indeed were admissible against the defendant in his murder trial as dying declarations. So in a real sense the forfeiture doctrine and the fundamental common-law principles that undergirded it were at work in *Woodcock* even outside any witness-tampering context.

*Dingler* is basically the same and no more helpful to petitioner. The court's cryptic ruling on the *ultra vires* Marian examination at issue in that case simply cited to *Woodcock*. The inadmissibility of the examination for failure to meet hearsay-based objections as a dying-declaration, as explained above, does not mean that the defendant had retained any confrontation claim after killing the victim. The State observes, also, that *Woodcock* and *Dingler* did not involve coroner's examinations; as indicated in *Lord Morley's Case*, coroner's examinations were treated differently from justice-of-the-peace examinations at common law.

vi. As with the statements challenged in petitioner's case, dying declarations are those of the homicide victim; they are admitted against the accused killer in the homicide prosecution; and they have not been subjected to cross-examination or oath. Most particularly, the defendant's wrongdoing leading to a dying declaration generally would not be motivated by witness tampering. The statements in petitioner's case in these essential ways thus bear a "striking resemblance," *Davis*, 547 U.S. at 830; *Crawford*, 541 U.S. at 52, to the statements deemed admissible in the dying-declarations cases. The historic equitable principles that traditionally governed confrontation-forfeiture cases remained applicable to solve the forfeiture question posed by the case at bar.

### 3. *This Court has signaled approval of admitting the murder victim's statements in the defendant's murder trial regardless whether the defendant's wrongdoing had been motivated by a witness-tampering purpose.*

In accepting the principle that the forfeiture by wrongdoing doctrine extinguishes confrontation claims, this Court traced the justification for doctrine back to *Lord Morley's Case*. *Crawford*, 541 U.S. at 62; *Reynolds*, 98 U.S. at 158-159. In addition, this Court has treated dying declarations, essentially similar to those at issue here, as valid despite the demands of the Confrontation Clause. See *Crawford*, 541 U.S. at 56 n. 6; *Pointer* v. *Texas*, 380 U.S. 694, 697 (1965). This Court has explained the admissibility of dying declarations in terms of equitable considerations such as those identified above. See *Kirby* u *United States*, 174 U.S. 47, 61 (1899) (admission justified by the "necessities of the cause"); *Carver* v. *United States*, 164 U.S. 694, 697 (1897) (admission justified by "necessities of the case, and to prevent an entire failure of justice"); *Mattox* v. *United States*, 156 U.S. at 244 (same).

As argued above, *Lord Morley's Case* and the dying-declarations rule combine to cover statements bearing a striking similarity to those in this case. There is thus a compelling logical and historical basis, confirmed by this Court's own Confrontation Clause precedents, for treating the situation in this case—where the defendant has murdered the witness—as a most compelling example of forfeiture of confrontation by wrongdoing without regard to the motivation of the wrongdoer.

### C. This Court has never identified a witness-tampering motive as a required element for a showing of forfeiture—and most assuredly has never endorsed such a rule where the defendant murdered the witness.

Petitioner argues that the facts underlying some of this Court's forfeiture precedents showed intentional tampering with a witness and that some later developments in federal law treat the defendant's witness-tampering motivation as a prerequisite to admission of his victim's hearsay. Petitioner's arguments fail to come to grips with the effect on the forfeiture calculus wrought by the defendant's murder of the witness, and fail to observe the distinction this Court has drawn between hearsay concerns and confrontation-clause concerns.

#### *1. The fact patterns in some of this Court's forfeiture cases do not limit the scope of the Court's clear acceptance of the forfeiture doctrine—especially for cases where the defendant murdered the witness.*

a. Petitioner's claims that the fact pattern in *Reynolds* and in this Court's later cases in that line portray witness-tampering defendants; so he concludes that the forfeiture-by-wrongdoing doctrine therefore must be limited to that context. (Pet. Br. 32-34.) But petitioner's view is myopic. He does not see the broader no-profit-from-wrongdoing principle confirmed in *Reynolds*. And, in fixing on the fact patterns of cases where witnesses had merely been detained by the defendant, petitioner loses sight of the central feature of his murder case: he intentionally killed the witness. In the same way, he ignores this Court's acceptance of the admissibility under the Constitution of dying declarations—statements very much like those at issue in this case as a matter of fact and very much like

them in terms of the absence of confrontation and a "witness tampering" setting.

Neither *Reynolds* nor any of this Court's cases in the *Reynolds* line ever limited the doctrine to tampering cases. Indeed, *Reynolds* specifically addressed the mental-state question in a way that tends only to contradict petitioner's argument for a "motive" requirement. *Reynolds* described the forfeiting act as a "voluntary" one. 98 U.S. at 158. Petitioner offers no justification for simply disregarding *Reynolds*' specific description of the mental state that supported application of the doctrine.

Petitioner interprets the *Reynolds* Court's comment on the defendant's silence at the foundational hearing in that case as a finding that he had made "a tactical decision that he would be better off preventing her from testifying than by confronting her on the stand." (Pet. Br. 22.) But the cited comment did not lay down any rule requiring proof of such a motivation for wrongdoing. The Court's comment pertained to a separate point: whether the government's showing should be viewed as persuasive in light of the defendant's studied silence on the foundational question of whether he had anything to do with the witness' absence in the first place. The *Reynolds* Court explained, "Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely on the weakness of the case made against him than to develop the strength of his own." 98 U.S. at 160.

b. This Court has applied the *Reynolds* forfeiture doctrine to new and different factual contexts, beyond rendering a witness unavailable and seeking to take advantage of it, that also implicated its fundamental equitable rationale. These applications illustrate that, as in the common law, the basic equitable no-profit-from-wrongdoing principles applied even more broadly to

different fact patterns. In *Eureka Lake & Yuba Canal Co.*, 116 U.S. 410, 418 (1886), this Court ruled that, where a corporation's agents avoided service of a court order, "*it cannot justly complain* if service on its attorney is made equivalent to that which its agents *by their wrongful acts have made impossible.*"

In *Dias* v. *United States*, 223 U.S. 442, 452-453 (1912), the Court applied the *Reynolds* doctrine to overrule a confrontation objection lodged by a defendant who placed the un-confronted testimony into the trial record in the first place. Because the defendant by his "voluntary act" placed the testimony into the record "and thereby sought to take advantage from it," he waived his confrontation right "and cannot now complain of its consideration." *Id.* The *Dias* situation is reminiscent of petitioner's in that, regardless of the defendant's original awareness of the consequences of his actions, his conduct was incompatible with his objection. Further, in applying the doctrine to contexts beyond that of rendering a witness unavailable, this Court continued to articulate the *Reynolds* equitable rationale—rather than any rule requiring an initial motive to exploit one's wrongdoing—in explaining its decisions.

The State's argument—that forfeiture applies where the defendant murders the witness without regard to any tampering motive—does not rely solely or primarily on the fact that this Court's precedents have never announced any such limitation. At bottom, the doctrine expresses the fairness and necessity concerns promoted by the equitable maxim identified in *Reynolds* as the rationale for its decision. As illustrated in similar common-law contexts, the balance of the factors that bear on the question —importantly, the seriousness of the wrongdoing and the obviousness of its potential to render the victim unavailable in the future—almost inevitably will tilt in favor of forfeiture where the defendant has murdered the witness.

***2. This Court's precedents, in confrontation cases and in other areas, refute petitioner's claim that the "wrongdoing" inquiry is a "waiver" question requiring proof of a particular state of mind by the defendant.***

a. Citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and *United States* v. *Houlihan*, 92 F.3d 1271, 1279-1280 (1st Cir. 1996), petitioner unrealistically recommends that the Court should inquire, not whether the defendant committed serious wrongdoing inimical to assertion of a confrontation right, but whether his act of wrongdoing put him on notice that he was "waiving" his opportunity for confrontation. (Pet. Br. 36-38.) Petitioner suggests that proof of a witness-tampering motive is required because it would serve to provide the defendant with "notice" that his confrontation right was at stake. (*Id.*)

But that interpretation of murder does not comport with reality. Killing somebody is radically different from being haled into a criminal court or from being confronted with government agents investigating a crime. Even if the fundamental moral difference could be put to the side, it would remain true that procedural rights do not operate in the criminal act of homicide itself. Murder, that is, is not a bargaining of legal claims. Further, it would ill-behoove the judiciary to involve itself in appearing to denigrate the victim by reviewing her murder merely instrumentally in order to "validate" it for confrontation-claim purposes. As the California Supreme Court discerned in the opinion below, J.A. 53, "the intent-to-silence element required by some cases evolved from the erroneous mischaracterization of the forfeiture doctrine as the waiver by misconduct doctrine."

b. Even if viewed in terms of "waiver" or "notice," killing the victim makes it obvious to the defendant that his victim in fact will be unavailable for any purpose,

necessarily including any court proceedings, in the future. If the defendant's "knowledge" or recognition of confrontation implications were deemed necessary to application of the forfeiture doctrine, the act of intentional murder certainly would subsume it in that sense. Indeed, a murderer like petitioner would have had an even more specific appreciation of the confrontation implications. When he premeditated and decided that he would shoot to kill Ms. Avie, he must have known that some sort of legal proceeding would be in the offing, and that he was putting her out of the way—even if that were not his motivation.

The marginal difference between purpose and knowledge remains insignificant in this context. Murder suffices for forfeiture even on a "waiver" theory.

c. This Court's description of the doctrine as one of "forfeiture," *Crawford*, 541 U.S. at 62, is helpful in conceiving why the admissibility of the witness' statement depends instead on equitable factors such as the nature of the misconduct and when it becomes intolerable to allow the defendant to seek protection from its "legitimate consequences" or to seek to "benefit" from it at trial. For, in *United States* v. *Olano*, 507 U.S. 725 (1993), this Court earlier had explained the distinctive nature of "forfeiture" of constitutional rights, as contrasted with the knowing relinquishment of such rights that characterizes "waiver." *Olano* explained that a defendant, without meaning to "waive" his claims and thus affect the course of judicial proceedings, nevertheless may be held to forgo even his constitutional rights in light of his conduct. *Id.* at 733.

This Court's precedents contain many examples where a defendant becomes foreclosed from making a valid constitutional objection, without a "waiver" or a putatively knowing decision to forgo it, on account of conduct deeply incompatible with the assertion of the right. It is unnecessary to categorize them as "forfeitures," or even as

instances of "wrongdoing"; they serve in any event as analogies tending to validate application of the *Crawford-Reynolds* doctrine in petitioner's case.

In the Sixth Amendment confrontation context itself, this Court in *Illinois* v. *Allen*, 397 U.S. at 343, held that the defendant's obstreperous in-court behavior properly cost him his right to remain present at his trial. In *Taylor* v. *United States*, 414 U.S. 17 (1973) (per curiam), the defendant's voluntary conduct in absenting himself from trial similarly foreclosed his confrontation claim.

The conceptual difference between "waiver" and forfeiture by conduct incompatible with the exercise of a right is illustrated in other cases involving constitutional claims. In *United States* v. *Scott*, 437 U.S. 83 (1978), this Court confirmed that the defendant may not raise a double-jeopardy objection to a retrial after he had obtained dismissal of the proceedings in the trial court. With special significance for the case at bar, the *Scott* Court explained, "We do not thereby adopt the doctrine of waiver of double jeopardy . . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.*, at 99. Similarly, this Court in *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958), held that a defendant who chooses to testify cannot then invoke the privilege against self-incrimination to refuse to submit to cross-examination on matters raised by her testimony.

In *United States* v. *Loud Hawk*, 474 U.S. 302, 316-317 (1986), this Court refused to consider, in calculating the delay cited by defendants in their speedy-trial claim, time attributable to the defendant's own frivolous or otherwise insufficiently meritorious interlocutory appeals. Under *Faretta* v. *California*, 422 U.S. 806, 833, n.46 (1975), a defendant who chooses to represent himself at trial may

not later claim a violation of his right to "effective" counsel. In *United States* v. *Robinson*, 485 U.S. 25, 34 (1988), the Court allowed prosecutorial comment on defendant's failure to testify, notwithstanding the general proscription on prosecutorial comment on the subject in *Griffin* v. *California*, as a "fair response to a claim made by defendant or his counsel." Also, a defendant who asserts a claim of ineffective counsel cannot then assert his attorney-client privilege or right to confidentiality about relevant conversations he had with the lawyer. *Bittaker* v. *Woodford*, 331 F.3d. 715, 716, 718-719 (9th Cir. 2003)(en banc) (explaining result as application of the "fairness principle").

In *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971), this Court held that a defendant, having testified inconsistently with a prior statement excluded under *Miranda* v. *Arizona* from the prosecution's case-in-chief, could no longer avail himself of the *Miranda* v. *Arizona* rule to exclude the statement from the government's rebuttal case. Nothing in *Harris* suggests any need for proof of the defendant's specific purpose or motivation in testifying. Petitioner says that *Harris* is different, because there the defendant "exploited" the *Miranda* rule by taking the stand and offering a new account of events. But, as the California Supreme Court pointed out, J.A. 56, petitioner capitalized on his wrongdoing when he introduced a one-sided version of statements allegedly made by Ms. Avie as support for his defense at trial. Having done that, he is in an especially poor position to complain about his inability to cross-examine her about other statements on account of his wrongdoing in rendering her unavailable at trial.

This Court's habeas corpus jurisprudence also makes clear that state-court defendants ordinarily may forfeit their federal constitutional rights even by inadvertent

failure to raise them in compliance with state procedural rules. *Murray* v. *Carrier*, 477 U.S. 478, 487-488 (1986). Similarly, a defendant might forfeit his right to produce evidence of consent in a rape prosecution by failing to provide statutory notice of his evidence long before trial. See *Michigan* v. *Lucas*, 500 U.S. 145, 153-154 (1991).

The State of Illinois' amici curiae brief in this case cites persuasive examples illustrating the similar operation in other contexts of the maxim that no one may be allowed to profit from wrongdoing. Those precedents, as with the ones cited above, confirm that the defendant's intent or purpose at the time of the wrongdoing is not the focus of the equitable principles that govern this case.

***3. The Federal Rules of Evidence provision on forfeiture of hearsay objections does not affect the constitutional question of when a defendant has forfeited his confrontation rights.***

Petitioner cites the Federal Rule of Evidence 804(b)(6), and federal cases leading up to its adoption, as requiring proof of intent to tamper as a requirement for forfeiture by wrongdoing in federal courts. (Pet. Br. 36-40.) But Rule 804(b)(6), and the cited federal case law, concerns extra-constitutional "evidence law" rules of hearsay. The "vagaries of the rules of evidence" cannot determine the scope of the a defendant's confrontation claims. See *Crawford*, 541 U.S. at 61. As follows from *Crawford* and its overruling of *Ohio* v. *Roberts*, hearsay policies are not the same as confrontation principles.

In this case, petitioner's wrongdoing operated to forfeit his confrontation rights; but, under California law, that forfeiture did not disable petitioner's from relying on state hearsay rules or other state evidence-code provisions. Those are extra-confrontation rules. Rule 804(b)(6) happens to be an extra-constitutional kind of rule that

trumps a defendant's hearsay objections, as a matter of legislative or judicial purpose, when its conditions are met. But the Rule does not determine the scope of the Constitution or limit the extent of the States' rein under it.

It is true that this Court in *Davis* remarked that Rule 804(b)(6) "codifies" the forfeiture doctrine. 547 U.S. at 833. That does not mean, however, that the Court held the Rule to be identical to the historical forfeiture doctrine that extinguishes confrontation claims. For, at the same time, in language different from that of the Rule, *Davis* reiterated that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.*

As ably explained in Illinois' amici curiae brief, the drafters of the Rule 804(b)(6) proposed it in light of federal appellate cases in the last thirty years that had adopted a hearsay forfeiture rule in dealing with the problem of witness killings in organized-crime prosecutions. So the Rule never purported to be a distillation of common-law or Framing-era confrontation principles. At most, the Rule presented a "codified" forfeiture doctrine for hearsay in federal cases, in the sense that it was formally promulgated by legislative or quasi-legislative action.

### D. Engrafting a motive-to-tamper requirement on the doctrine would produce untoward results, whereas the forfeiture doctrine as applied to this case would not subvert any remaining Sixth Amendment interest of the defendant.

Petitioner ignores harmful results that would follow from adoption of an artificial motive-to-tamper limitation on the kind of wrongdoing that might justify overriding the defendant's interest in confrontation. And he greatly exaggerates when he claims that various ill effects will

follow if the doctrine is not restricted to motive-to-tamper wrongdoing.

*1. Petitioner's proffered rule would produce untoward results.*

a. Petitioner's proposed witness-tampering limitation on the doctrine is not worth the resulting risk that an increased number of motive-to-tamper murders will avoid forfeiture undeservedly. In many cases—maybe most cases—the evidence that establishes that the defendant's motive was to prevent testimony consists of information known to the victim in particular. The defendant might have revealed his reason to the witness earlier before killing her: he might have complained to the witness about her status in the days leading up to the killing; and he earlier might have threatened to kill her if she persisted in cooperating in the case. These examples may be typical, for example, in domestic-violence cases that represent a serious problem and that, as this Court has observed, are notoriously susceptible to coercion and intimidation of witnesses. *Davis*, 547 U.S. at 833; see also *Georgia* v. *Randolph*, 547 U.S. 103, 127 (Roberts, C.J., dissenting), 145 (Scalia, J., dissenting) (2006). Unless the defendant were to foolishly announce his motive to other witnesses, the murder well might do away with both the witness and her crucial testimony about the "tampering" purpose of the killing.

Although one might broadly portray the question posed in this case as one of specific "intent," it is more precisely one of motive or purpose. See *United States* v. *Simpson*, 950 F.2d 1519, 1524-1525 (10th Cir. 1991). Traditionally, in criminal law, the State need not prove the "motive" even to establish the defendant's guilt of a crime. 1 WHARTON'S CRIMINAL EVIDENCE 383-384 (14th ed. 1985). And, certainly, it is more difficult to prove motive than intent.

Intent is most often deductible from the physical components of the crime. In the age of computer websites such as "whosarat.com," identifying alleged government witnesses, the question may become even more difficult. Here, petitioner obviously intended to kill Miss Avie from the fact that he shot her six times in the torso at close range while she was unarmed, including once while she lay on the ground. But his actual motive remains his secret to this day.

As in this murder case, the subjective witness-tampering motive of an abuser in intimidating a domestic partner or child may be very difficult to prove, even though his serious and intentional criminal conduct predictably would cause the victim's unavailability to testify. The illogical imposition of the "motive" rule advocated by petitioner would unnecessarily diminish the effectiveness of any otherwise sound forfeiture doctrine in murder cases, such as this one, and perhaps beyond. See *Georgia* v. *Randolph*, 547 U.S. at 117-118 (detailing serious nature and prevalence of domestic violence, including estimates of 2,000,000 injuries and 1,300 deaths in the United States each year); RENNISON, BUREAU OF JUSTICE STATISTIC CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001, 1(2003) (1,247 women and 440 men killed by an intimate partner in 2000); T. Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749 (2005) (noting high percentage of victim recantation in domestic violence cases).

***2. Applying the forfeiture doctrine as in this case would enhance the fairness of criminal trials.***

a. Petitioner complains that, unless a specific-purpose requirement is engrafted on the doctrine, too many cases will result in forfeitures. (Pet. Br. 43.) But it is not true that validating the doctrine in this case will exclude an

entire class of defendants from their Confrontation Clause protection. Murder defendants will retain their confrontation rights with respect to the testimony of other witnesses at their trial—that is, witnesses they have not killed. To describe them as an entire "class" of defendants, as petitioner does, is misleading. Even petitioner's motive-to-tamper embellishment on the doctrine might be said to disentitle a "class" of defendants charged with capital murder based on killing a witness to keep her from testifying. See, *e.g.*, Cal. Penal Code § 190.2(a)(10). There will always be a "class."

If the forfeiture doctrine in truth is a valid exception to confrontation, as this Court has said, it is hard to see what legitimate interest connected to the Sixth Amendment would be advanced by the merely instrumental device of limiting its application in terms of the raw numbers of cases affected. And if the doctrine on its merits applies in witness-murder case regardless of the defendant's motive—as the State argues here—then there can be no valid objection to applying it in any case where it is justified under that understanding of the doctrine. That is simply the rule of law.

b. Petitioner exaggerates when he forecasts a whirlwind from the forfeiture doctrine as interpreted by the California Supreme Court. Here, the forfeiture was based on the gravest crime of murder. The future unavailability of the victim to be a witness was obviously predictable at the time; indeed, a premeditating killer well could anticipate the intervention of law enforcement. Further, the causal link between the wrongdoing and the witness' absence at trial is incontrovertible.

How the forfeiture doctrine would operate in cases involving wrongdoing different from intent-to-kill murder—where unavailability might be debatable, where causation questions well might range beyond that of the

identity of the killer, and where unavailability might not be so clearly foreseeable—is not directly at issue here. The same is true for cases where the wrongdoing might be unintentional. For example, a domestic-violence or child-abuse victim may clearly be "unavailable"—most predictably from the wrongdoing defendant's vantage—even where the defendant might not have specifically intended to bring about their absence at trial. See D. Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 NO. CAROLINA L. REV. 1, 41-46 (2006). The case at bar, however, presents what is the strongest argument for forfeiture irrespective of motive to tamper: the defendant's murder of the witness.

Moreover, beyond petitioner's and NACDL's concerns about the fairness of trials (NACDL Br. 29), this Court must consider the effect on the accuracy of the trial where the defendant unjustly succeeds in excluding the testimony of his victim. A ruling that the defendant has forfeited confrontation indeed will result in admitting un-cross-examined hearsay. But, unless justified, the alternative well might be that of presenting to the jury a one-sided version of crucial events by the defendant. Indeed, as happened in this case, the defendant could easily go further and allege that the victim had made statements that support the defense view of the case, while contrary relevant statement of the victim remain outside the reach of the jury.

Also, as proved to be true in petitioner's case, his forfeiture by wrongdoing did not necessarily lead to forfeiture of all defense hearsay-based objections, or any other objections, to the disputed evidence. Here, petitioner retained his recourse to any other California Evidence Code objections to the proof of Ms. Avie's statement, including state-law hearsay objections. *Giles*, J.A. 64. The Federal Rules of Evidence—on which as many as forty-one

other States pattern their own evidence codes—apparently require proof of the defendant's specific intent to tamper, as petitioner urges in this case, before the defendant will be deemed to have waived his codified hearsay objections to statements such as Ms. Avie's. See Fed. R. Evid. 804(b)(6). Presumably, that Rule will remain the standard in other States that follow the federal example.

There is no reason to think that the States will engage in wholesale rejections of any limits other than the constitutional minima. State evidence codes have never functioned as mere devices to strip criminal defendants of all their rights. Instead, the evidence rules of all American jurisdictions necessarily tend only to enhance those rights and to provide the defendant with extra-constitutional protection deemed appropriate by state and federal policy-makers.

And, despite petitioner's and NACDL's assumed air of fatalism in the face of a couple of articles in legal publications (Pet. Br 43-44; NACDL Br. 28), state courts and state lawmakers do not reflexively cater to policy proposals from individual prosecutors. Even were all local-law protections to suddenly vanish, there would remain constitutional standards, under the Due Process Clause, ensuring fundamental reliability of evidence admitted in criminal cases. See *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967).

Petitioner supposes that the prosecution, confident of a forfeiture ruling, will not do its best in trying to produce a witness who has been cowed by the defendant's coercive conduct. But there is no reason to think the prosecution will generally favor recited hearsay over live in-court testimony from a victim. Moreover, there remain constitutional requirements of diligence on the part of the prosecution before a witness might be deemed unavailable. See *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968)

(government fails to pursue available means for producing witness); *Motes* v. *United States*, 178 U.S. 458 (1900) (government negligence); cf. *Mancusi* v. *Stubbs*, 408 U.S. 204, 212 (1972). It should not lightly be assumed that courts will relax their vigilance in assuring genuine unavailability caused by the defendant's wrongdoing.

In addition, as the California Supreme Court ruled in this case, the showing of the defendant's wrongdoing may not be made solely on the basis of the absent witness' un-confronted testimony. J.A. 64. "[I]ndependent corroborative evidence" is needed to support a forfeiture ruling. *Id.*

Finally, contrary to NACDL's assertion (NACDL Br. 29), petitioner indeed retained the opportunity to produce evidence to undermine victim Avie's statement. Thus, he was allowed to introduce testimony, including evidence of Ms. Avie's own alleged statements, portraying Ms. Avie as "a violent, aggressive, foulmouthed, jealous, and volatile person." *Giles*, J.A. 56. Under local evidence rules, Cal. Evid. Code § 1202 (impeaching hearsay declarant); Fed. R. Evid. 613(b), 806—if not the Constitution itself, see *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Carver* v. *United States*, 164 U.S. at 697—further available evidence of bias on her part could have been admissible too. True, petitioner could not cross-examine her for that purpose at trial. But whose fault was that?

* * *

In sum: The California Supreme Court properly interpreted the forfeiture-by-wrongdoing rule in petitioner Giles' cases as not requiring any intent to tamper with a witness in a court proceeding. In its decision in that regard, the opinion below is buttressed by the similar holdings of a growing number of state and federal courts.

E.g., *United States* v. *Garcia-Meza*, 403 F.3d 364; *State* v. *Sanchez*, 341 Mont. 240, 177 P.3d 444 (Mont. 2008); *Gonzalez* v. *State*, 155 S.W.2d 603, 610-611 (Tex. App. 2004); *State* v. *Mason*, 160 Wash.2d 910, 162 P.3d 396, 404 (Wash. 2007); *State* v. *Jensen*, 727 N.W.2d 518, 535 (Wis. 2007); see also *State* v. *Meeks*, 88 P.3d 789 (Kan. 2004); *People* v. *Bauder*, 269 Mich. App. 174, 712 N.W.2d 506, 514-515 (Mich. App. 2005); *People* v. *Moore*, 117 P.3d 1, 5 (Colo. Ct. of App. 2004).

## II.

### FRAMING-ERA PROCEDURE DOES NOT LIMIT THE FORFEITURE DOCTRINE ONLY TO WITNESS-TAMPERING CASES WHERE THE WITNESS' STATEMENT WAS SWORN AND SUBJECT TO CROSS-EXAMINATION

Petitioner and amicus NACDL suggest that—regardless of how forcefully the no-profit-from-wrongdoing principle might compel the application of the forfeiture doctrine to a non-tampering case such as petitioner's—separate historical reasons having to do with common-law pre-trial procedure dictated that the victim's statements remained inadmissible unless the defendant's wrongdoing was motivated by witness-tampering *and* the victim's statements complied with Marian-statute procedure in that they were under oath *and* subject at least to a prior opportunity for cross-examination. (Pet. Br. 20-31; NACDL Br. 5-25.)

Under that view, a criminal defendant would forfeit his confrontation rights to object to the witness' statements if he kills her to keep her from appearing at trial as she leaves the courtroom after testifying at his formal preliminary hearing. But he will not forfeit his right with respect to identical statements she made to the police as long as he kills her on her way into the courthouse rather

than on her way out—even if he does so for the purpose of preventing her from testifying.

If then-existing English statutory procedure were to shape the forfeiture doctrine that way, it would be more than anomalous; it would improperly prescribed a "recipe for its extinction." See *Davis*, 547 U.S. at 830, n.5. The effect would be felt not just in California and in other states where the forfeiture doctrine has been applied without any motive-to-tamper restriction on the wrongdoing. With prior-oath and prior-cross-examination restrictions, as NACDL implies, the Federal Rules of Evidence might become casualties. So might the federal case law of the last quarter-century on which petitioner otherwise relies for his motive-to-tamper argument. And this Court's recognition in *Crawford* and *Davis*—that the forfeiture-by-wrongdoing doctrine "extinguishes confrontation claims"—will have become meaningless. For the doctrine would apply only where the essential confrontation components of unavailability and prior opportunity for cross-examination are present anyway. So it would not be an exception at all.

In the event, any claim based on oath and cross-examination comes too late in this case. More fundamental, petitioner's and NACDL's arguments ignore the principles that governed the way the common law dealt with confrontation where the defendant had killed the witness and that continue to inform it in America as recognized in *Reynolds* and *Crawford*.

**A. Any claim that the forfeiture doctrine itself requires oath and a prior opportunity for cross-examination is not properly before the Court.**

Petitioner and NACDL argue that, when the Sixth Amendment was adopted, the doctrine at common law allowed admission only of prior sworn testimony where the accused had an opportunity for cross-examination. (Pet.

Br. 10-20; NACDL Br. 6-12.) If pressed as a reason to exclude the victim's statements here, any such argument comes too late in two different senses.

1. First, the certiorari petition never raised such objections to the admission of the statements in this case. The Question Presented asked specifically, and only, whether application of the forfeiture rule depended on a showing of a specific witness-tampering purpose. That question does not subsume completely different objections based on an the alleged need for oath and prior cross-examination in any event.

2. Any such objections also would come too late in that this Court made it clear in *Crawford* and in *Davis* that it accepts the forfeiture rule *as an exception to confrontation*. *Davis*, 547 U.S. at 833; *Crawford*, 541 U.S. at 62. To suddenly argue now that the confrontation rule of unavailability and prior opportunity for cross-examination must be observed, see *Crawford*, 541 U.S. at 68, regardless of the defendant's wrongdoing of any kind, would be to simply deny the *Crawford* and *Davis* premise for the Question Presented.

**B. Accepting the claim that the forfeiture doctrine itself requires oath and a prior opportunity for cross-examination, whether the defendant kills the witness or not, would depart from Framing-era law and would make no sense.**

1. In any event, it would not be convincing to argue that confrontation may be forfeited by wrongdoing only where the defendant's motive was to tamper with a proceeding and where the victim's out-of-court statement was already subject to oath and cross-examination.[4] As the state has

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[4] If the Marian-declaration framework exhausted the kinds of

just explained, the argument is fundamentally anti-*Crawford*. And, as the State explained in argument I, the common-law recognized in principle, and in evidentiary rulings, that the defendant's wrongdoing in causing the witness' absence could dispense with confrontation without regard to oath, prior opportunity for cross-examination, or any tampering motivation on the part of the defendant.

2. Even if the Framing-era defendant-kills-witness or defendant-keeps-away-witness precedents are not exact replicas of the case at hand, that would not mean the forfeiture-by-wrongdoing doctrine may not be applied to the new case. Although *Crawford* stated that the Confrontation Clause was "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding," 541 U.S. at 54, it accepted the forfeiture-by-wrongdoing doctrine as such an exception, *id.* at 62. The equitable principles that delimit the forfeiture doctrine's exception to confrontation may be seen as separate from the confrontation rule itself, so that applying the cases fitting the wrongdoing-unavailability template does no

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statements that might be admitted, it would be more of a mere artifact of the system than a thoughtful policy choice on the issue of forfeiture. In this case, Brenda Avie summoned the police three weeks before her death when petitioner beat and threatened her; the police dutifully wrote down her statements; and the prosecution used them in petitioner's murder trial. If this case had arisen at common law, it is doubtful there ever would have been a record of that first formal statement of the domestic-violence victim for use in a prosecution of the defendant for the later murder. At common law, for example, a husband had a right to "chastise" his wife with corporal punishment, see R. Siegel, *The Rule of Love: Wife Beating as Prerogative and Policy*, 105 YALE L. J. 2117, 2206 (1996). It is unlikely the a domestic-violence victim would have haled the abuser before the justice of the peace and created a Marian-examination record the first time around.

violence to the original meaning of confrontation itself. See *Davis*, 542 U.S. at 823-824, see also *Georgia* v. *Randolph*, 547 U.S. at 144 (Scalia, J., dissenting). It is not inappropriate to engage in "inference" or "a degree of estimation," in the absence of a direct example, about what the common law of forfeiture "would have been" in a case such as this one fitting the defendant-kills-witness template. See *Crawford*, 541 U.S. at 50, 52-53, n.3.

In *Davis*, for example, this Court drew the line between testimonial statements subject to confrontation and non-testimonial statements not governed by the confrontation clause so that a witness' retrospective statement to the police fell on the side of the line governed by the clause—even though the early American cases invited the view that the clause covered only formalized sworn statements in a judicial setting. *Davis*, 547 U.S. 821; see *id.* at 838 (Thomas, J., dissenting) (noting lack of direct common-law example). In drawing the line where it did, the Court considered whether the line made sense in terms of the confrontation principles at issue. *Id.* at 838.

Similarly, in *Reynolds*, the Court applied a burden-shifting presumption to ascribe to the defendant the act that caused the witness' absence. 98 U.S. at 160. The Court did not pause to consider whether *Lord Morley's Case* ever endorsed application of the forfeiture doctrine in that precise way. Nor did it pause to consider whether Reynolds' failure to assist the government in serving a subpoena constituted the kind of wrongdoing at common law that might have triggered the no-profit-from-wrongdoing maxim.

Here, the Framing-era cases spoke to clearly delineated problem: that of the defendant wrongfully exploiting the witness' unavailability. They accepted the no-profit-from-wrongdoing maxim and its underlying principles—equitable considerations of fairness and

necessity and integrity of the proceedings—for resolving the problem and did so especially in the criminal-homicide setting. They support the best representation of the rule originating in *Lord Morley's Case* and reflected in the dying-declaration rule: where the defendant kills the witness, her statements may be admitted against him regardless of his tampering motive, regardless of oath, and regardless of any prior opportunity for cross-examination.

3. That inference becomes stronger in view of the injustice and weakness of the alternative interpretation. NACDL and perhaps petitioner suggest that the common law would not have distinguished the defendant's murder of a witness from the witness' innocent absence form the proceeding on account of illness. (Pet. Br. 10-20; NACDL Br. 6-12.) In this view, these are morally equivalent examples of neutral "unavailability" law. But that is an improbable estimation of what the law would have been. In *Lord Morley's Case*, 6 St. Tr. at 770, the judges' "fourth resolution" pertained to the ramifications of a witness' death or unavailability to travel; but a separate "fifth resolution" pertained separately to the distinct evil of a defendant wrongfully keeping the witness away. And, as noted earlier, Gilbert's treatise and Taylor's treatise gave distinct justifications for the forfeiture rule triggered where the defendant is at fault for the unavailability of the witness. Wigmore's treatise also dealt with the defendant's wrongdoing in a separate sub-section; and Wigmore further reported that the defendant in the specific instance of wrongdoing would be "estopped from making *any objection* based on the results of his own chicanery." 3 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1766 [§ 1405] (1904 ed.); *id.*, at 120 [§ 1405] (1923 ed.) (emphasis added). Under such a rule, unlike in the case of innocent unavailability, all objections based on any interest in cross-

examination made impossible by the defendant's own misconduct logically would be barred. Otherwise, the defendant's wrongdoing—as opposed to the bare unavailability of the witness—improbably would have no consequence.

4. Under NACDL's numb-to-equity view of common law, a defendant might forfeit his confrontation rights by killing, with a tampering motive, a witness who already had testified against him at a preliminary hearing—but he could exclude his victim's statement on account of her absence if he killed her for the same witness-tampering reason on her way to the preliminary hearing after she merely had given the statement to the police. If wrongdoing ever justifies dispensing with confrontation, it makes no sense to dispense with confrontation in the former instance but to insist on it in the latter.

5. Petitioner himself ultimately seems to acknowledge that the *Lord Morley's Case* rule was a distinct one that applied to admit statements of the detained or killed witness without regard to a prior opportunity for cross-examination. (Pet. Br. 20 et seq.) (Elsewhere in his brief, however, petitioner claims that early nineteenth century cases precluded use of a dead witness' ex parte statements. (Pet. Br. 12.) But the cases he cites—*State* v. *Webb*, 2 N.C. 103 (1794), *Johnson* v. *State*, 10 Tenn. 58 (1821), and *State* v. *Campbell*, 30 S.C.L. 124 (1844)—involve situations where the witness simply had died in the meantime. They were not cases where the defendant had killed him. Two of them, moreover, were horse-stealing cases, and not murder cases.) Still, he says that the law still imposed a requirement that such statements be under "oath." If observed at all, however, the forfeiture-by-wrongdoing doctrine's traditional justifications would serve to allow the admission of the prior statement of a murdered or detained witness without regard to any oath that the defendant's

wrongdoing had obviated—just as they would admit the statement without regard to the cross-examination that the defendant's misconduct had also made impossible.

The absence of oath, in any event, would not provide petitioner with a Confrontation Clause claim now. As noted earlier, such a claim was not raised in the certiorari petition in this case. The claim would lack substance anyway. The Sixth Amendment guarantees the defendant's right "to be confronted with the witnesses against him." As this Court made clear in *Crawford*, that guarantee is a cross-examination guarantee. 541 U.S. at 59-62; see *Mattox* v. *United States*, 156 U.S. at 242-243. The Constitution does not state that the witnesses also must testify under "oath." The Framers imposed oath requirements elsewhere in the Constitution, see U.S. Const., Art. I, § 3(5), Art. II, § 1(8), Art. VI, § 3, but they did not set one out in the Confrontation Clause.

* * *

This Court in *Crawford* accepted the doctrine dictating that a defendant may forfeit his confrontation right when he wrongfully causes the victim's absence from the trial. However that forfeiture doctrine might apply in other situations, it at least must apply in a murder prosecution where the defendant has intentionally killed the witness and seeks to exclude her "testimony" on grounds of her absence. Framing-era cases illustrate the principles supporting the confrontation-dispensing rule in fundamentally similar situations. This Court's precedents support those principles and their application to cases similar to this one. To require proof that the murder was motivated by a witness-tampering purpose makes no sense under the traditional maxim undergirding the doctrine: no one may take legal advantage from his wrongdoing.

## CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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March 19, 2008

# REPLY BRIEF

15

No. 07-6053 4-10-08

IN THE

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of California**

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## INTRODUCTION

We established in our opening brief that the decision below should be reversed because it erroneously read *Crawford v. Washington*, 541 U.S. 36 (2004), as authorizing an open-ended "equitable" forfeiture doctrine which eliminates the traditional "need for evidence of witness tampering and [thereby] broaden[s] the scope of the [forfeiture] rule to all homicide cases." J.A. 46. In view of the undisturbed finding in this case that "there was no evidence [Petitioner] shot [the victim in this case] with the intention of preventing her testimony at some future trial," J.A. 20, the state supreme court below could not uphold Petitioner's conviction without creating a broad "equitable" murder-victim exception to confrontation rights that did not exist at common law.

Respondent's brief does nothing to cast doubt on the conclusion that the decision below is irreconcilable with historical doctrine and this Court's Confrontation Clause jurisprudence. In particular, Respondent is unable to counter the critical fact that the evidence at issue here would have been excluded by Framing-era courts, which recognized neither a homicide-victim exception nor the more generalized "equitable" exception to the right of confrontation urged by California and its *amici*. To the contrary, common law courts uniformly excluded unsworn hearsay statements by alleged murder victims—all of which would have been admissible under the lower court's broad forfeiture rule—unless the statements met the strict requirements of the dying declaration exception. And although courts would admit a validly taken Marian

pretrial examination if the witness was kept away from trial by the accused, no case ever applied that forfeiture rule—and no authority so much as hinted that the rule would apply—outside the narrow context of witness-tampering. Thus, it is clear that California's sweeping forfeiture-by-causation rule constitutes a radical break with the historical, traditional, and mainstream understanding of the forfeiture by wrongdoing exception. That break is fatal to California's rule, because the Sixth Amendment "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54.

## I. THE STATEMENT AT ISSUE HERE WOULD HAVE BEEN EXCLUDED AT COMMON LAW

As developed in our opening brief, California's broad "equitable" exception to confrontation rights had no analogue at common law, and Ms. Avie's testimonial hearsay statement would have been inadmissible under Framing-era and traditional confrontation analysis. Pet. Br. 20-34, 41-42. Indeed, California and its *amici* do not contest that statements like the one at issue here were repeatedly excluded by Framing-era courts, which admitted unsworn statements of homicide victims *only* when they satisfied the strict requirements of the dying declaration exception. Nor can they point to any case at common law—homicide or non-homicide—in which the forfeiture doctrine was applied in the absence of intent to make the witness unavailable. Under *Crawford*, the clear inadmissibility of statements like Ms. Avie's at the time of the Framing and the clear inapplicability of the traditional forfeiture doctrine

preclude the adoption of the much broader exception California now advocates.

### A. The State's Homicide-Victim Exception Conflicts With Framing-Era and Traditional Forfeiture Doctrine, Which Required Intent to Prevent Testimony

The State and its *amici* do not contest that the common law cases applying the forfeiture doctrine uniformly involved witness-tampering. Indeed, Professor Friedman concedes that "the cases admitting statements under an explicit forfeiture rationale concerned witness tampering." Br. of Richard D. Friedman as *Amicus Curiae* in Support of Resp't 23 [hereinafter Friedman Br.]. The State contends, however, that the doctrine nonetheless extended beyond witness-tampering, Resp't Br. 17-19, 27-28, and that common law courts *would have* applied the forfeiture doctrine to cases not involving intentional witness-tampering, if only such fact patterns had been presented.

This argument is fundamentally flawed because there were numerous cases at common law in which—under the expansive theory adopted below—a homicide victim's statement would have been admissible under the forfeiture doctrine, and yet the courts excluded the proffered evidence. Indeed, California's rule was so clearly *not* the rule at common law that forfeiture was not even argued as a basis for admissibility in these cases; rather, the potential admissibility of a homicide victim's statement was typically analyzed—and rejected—under the dying declaration doctrine. A leading example is *King v. Dingler*, 2 Leach 561, 563, 168

Eng. Rep. 383, 384 (Old Bailey 1791), which this Court discussed in *Crawford*, 541 U.S. at 46, 54 n.5, and *Davis v. Washington*, 547 U.S. 813, 828 (2006), and which excluded the testimonial statement of the deceased victim because it was not a dying declaration (the victim was not then aware of impending death) and not a valid Marian examination. In addition, see *John's Case* (1790), *cited in* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357-58 (1803) [hereinafter EAST] (statement inadmissible because "there was no foundation for supposing that the deceased considered herself in any danger at all"); *Henry Welbourn's Case*, *cited in King v. Woodcock*, 168 Eng. Rep. 352, 353 n.a3 (1789) (same); *State v. Moody*, 3 N.C. 31, 1798 WL 93 (N.C. Super. L. & Eq. 1798) (same); *Nelson v. State*, 26 Tenn. 542, 7 Hum. 542 (Tenn. 1847) (same); *Lewis v. Mississippi*, 1 Morr. St. Cas., 1847 WL 1803 (Miss. Er. & App. 1847) (same); Br. of Nat'l Ass'n of Crim. Defense Lawyers as *Amicus Curiae* in Support of Pet. 17-22 [hereinafter NACDL Br.]. The exclusion of the evidence in these cases demonstrates conclusively that there was no broad forfeiture exception for homicide victim statements at the time of the Framing.

Contemporary descriptions of the forfeiture rule confirm this point. Although the State insists that the term "means" used in some authorities' discussions of the rule could sometimes merely mean "caused," Resp't Br. 19, the term surely connoted deliberate witness-tampering when used in conjunction with phrases like "detained," "withdrawn," and "kept away." Pet. Br. 29-31. For example, the connotation of deliberate witness

tampering is patent in Chief Baron Gilbert's statement of the forfeiture rule that applied to Marian coroner's examinations when there was proof "that the Witness is *detained* and *kept back* from appearing" by "evil Practices on the Witness." GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (1756 ed.) (emphasis added). Moreover, although some statements of the rule used the term "means," many others did not. *See, e.g.*, *Lord Morley's Case*, 6 How. St. Tr. 769, 776-77 (H.L. 1666) (witness "*withdrawn* by the *procurement* of the Prisoner") (emphasis added); NACDL Br. 13-14 (citing additional cases). Clearly, no one at the time of the Framing attached the significance to the word "means" that the State now attributes to it.

Furthermore, the efforts of the State and its *amici* to explain why there is no common law case applying the forfeiture doctrine outside the witness-tampering context are futile. Some assert that there were no cases involving a pre-crime out-of-court statement (as in this case) because domestic violence was not an important concern or a criminal act at the time of the Framing. *See, e.g.*, Friedman Br. 23-24. But that is no explanation at all, because under the broad forfeiture-by-causation rule adopted below, there is no difference between a pre-crime statement and a post-crime statement—*both* types of statements by a homicide victim would be admissible on the ground that the defendant caused the witness's unavailability. *See People v. Giles*, 152 P.3d 433, 446 (Cal. 2007). And, as demonstrated *supra*, common law courts consistently excluded such statements unless they satisfied the dying declaration doctrine.

In any event, whatever the historical treatment of domestic abuse, there surely were many instances in which a homicide victim, prior to the fatal attack, had previously reported threats made by the killer in the course of seeking help from a relative, neighbor, local vicar, or even local constable (who actually was duty-bound to suppress all "affrays," including domestic violence).[1] Yet, the State and its *amici* cannot identify a single reported decision in which any such report of a threat by a person who was later the victim of a homicide was admitted in a criminal homicide trial.[2]

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[1] *See, e.g.*, 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 139 [sect. 8] (Thomas Leach ed. 1787) (stating that "[w]here an affray is made in a house in the view or hearing of a constable" he may break down the door and enter "to suppress the affray"); JAMES PARKER, CONDUCTOR GENERALIS 12-13 (printed by John Patterson for Robert Hodge, New York 1788) (entry for "AFFRAY" stating that a constable is "bound at his peril to use his best endeavours" to suppress any affray and that "if an affray be in [a person's] house, the constable may break open the doors to preserve the peace").

[2] One of respondent's *amici* claims that there was a "tender years" hearsay exception under which English courts "routinely" admitted hearsay accounts of testimonial statements by child victims and suggests that this somehow supports California's rule at issue here. Br. of Nat'l Ass'n of Counsel for Children & the Amer. Prof'l Soc'y on the Abuse of Children as *Amicus Curiae* in Support of Resp't 7 [hereinafter NACC Br.]. However, although English courts may have made inconsistent rulings on that issue in an earlier period, the ruling in *King v. Brasier*, 1 Leach 199, 201, 168 Eng. Rep. 202, 203 (K.B. 1779), prohibited such hearsay, holding: "[T]he evidence of the information which the infant had given to her mother and the other witness, ought not to have been received." Thus, Blackstone, one of the judges who decided *Brasier*, wrote in 1783 that "no hearsay evidence

In sum, it is clear that statements like Ms. Avie's were inadmissible at common law and that the forfeiture doctrine recognized at the time of the Framing did not provide a basis for admitting them.

### B. The State's Attempt to Turn the Dying Declaration Exception Into an Open-Ended "Equitable" Exception is Unavailing

Having failed to connect California's novel forfeiture-by-causation rule to the historical forfeiture doctrine, Respondent alternatively claims that the forfeiture-by-causation rule shares the same common law roots as the dying declaration exception. To this end, Respondent claims that the dying declaration rule at common law rested on "equitable considerations" and bears a "striking resemblance" to Ms. Avie's testimonial statement. Resp't Br. at 20-22. These claims also do not withstand scrutiny.

Most importantly, even if the State were correct that the dying declaration doctrine was founded on "equitable" considerations, this would provide no basis for expanding the doctrine beyond the bounds that were recognized at common law. Just as the Framers did not "leave the Sixth Amendment's protection to . . . amorphous notions of 'reliability,'" *Crawford*, 541 U.S. at 61, they equally

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can be given of the declaration of a child who hath not capacity [that is, is not old enough] to be sworn . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 214 (9th ed. 1783) (citing *Brasier*). In any event, no issue of children's statements is before the Court in this case, and nothing in the cases cited by NACC supports California's novel rule.

did not leave those protections to amorphous notions of "equity." Accordingly, as *Crawford* makes clear, the Sixth Amendment recognizes "*only* those exceptions established at the time of the founding." *Id.* at 54 (emphasis added). Under this clear command, the existence of a narrowly-drawn dying declaration exception—even if based in part on equitable considerations—does not give the courts carte blanche to eclipse the Sixth Amendment confrontation right with other exceptions that appeal to a particular court's sense of equity.

In any event, historical sources show that the dying declaration of a murder victim exception was grounded, not on equitable principles, but on *a combination* of necessity and trustworthiness considerations. The necessity requirement referred to a unique aspect of a homicide prosecution—namely, that the deceased victim's account might be the only source of crucial information such as the identity of the attacker and thus a homicide prosecution might be impossible without the exception. Consistent with this necessity consideration, the content of an admissible dying declaration was limited to a victim's statement, made after the attack, regarding the immediate facts and circumstances of the infliction of the fatal wound itself. *See* 1 EAST at 353-54. The trustworthiness requirement was expressed in the limitation of the exception to a statement made after the infliction of the fatal wound and while the victim was aware of impending death and, thus, was aware of the solemnity of his or her situation as would have been the case if a judicial oath had been administered. *See id.* at 354; NACDL Br. 16-22. The exception applied

only if *both* aspects of this necessity/trustworthiness rationale were satisfied.

To support its claim that the dying declaration exception simply rested on an equitable rationale, the State arbitrarily renames necessity as equity. For example, the State characterizes as equitable Edward Hyde East's statement that the rationale for the dying declaration exception was that the victim of a homicide "is gotten rid of" by the defendant. Resp't Br. 20-22 (quoting 1 EAST at 353). *See also* Friedman Br. 22 n.23 (quoting same but claiming East gave a forfeiture rationale). However, East actually wrote that "the declaration of the deceased after the mortal blow, *as to the fact itself*, and the party by whom it was committed" was admissible "on the fullest *necessity; for it often happens that there is no third person present to be an eye-witness* to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of." 1 EAST at 353 (emphasis added). East then made perfectly clear, however, that necessity alone was not sufficient grounds to admit such statements: "[I]n order to preserve as far as possible the purity and rectitude of such evidence, it *must appear that the deceased at the time of making such declarations was conscious of his danger*, such consciousness being considered as *equivalent to the sanction of an oath* . . . ." *Id.* at 353-54 (emphasis added). Thus, East clearly rested the exception on necessity, not equity, and also required that the declarant be aware of

imminent death. East did not state an equitable or forfeiture rationale.[3]

The cases from this Court that Respondent cites are similarly unavailing. *See Carver v. United States*, 164 U.S. 694, 697 (1897) ("[dying declarations] are received from the necessities of the case . . . . They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible . . . ."); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (stating in dicta that "the ground upon which such exception rests is that, from the circumstances under which dying declarations are made, they are equivalent to the evidence of a living witness upon oath"); *Mattox v. United States*, 156 U.S. 237, 244 (1895) ("[Dying declarations] are admitted . . . simply from the necessities of the case . . . . [T]he sense of impending

[3] Virtually all the other authorities that Respondent cites likewise state this combined necessity/trustworthiness rationale. Respondent simply relabels the necessity rationale as "equity-based" and then ignores the fact that even necessity was only a necessary, not a sufficient, condition of admissibility. Resp't Br. 20-22. *See Jackson v. Knuffen*, 2 Johns. 31, 32 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring) (noting necessity consideration that, except for admitting the victim's dying declaration, justice might otherwise "be defeated"); *Wilson v. Borem*, 15 Johns. 286, 291 (N.Y. Sup. Ct. 1818) (same); *State v. Ferguson*, 20 S.C.L. (2 Hill) 619, 624 (S.C. App. 1835) (stating exception based on "necessity" arising from circumstance "that none but the victim witnesses the [infliction of wound]" and "[t]he sanction is that of approaching death"); SIMON GREENLEAF, TREATISE ON EVIDENCE 187-92 [secs. 156-162] (1842) (giving detailed but essentially similar description as EAST); *State v. Bohan*, 15 Kan. 407, 418 (1875) (basing dying declaration on the necessity consideration that otherwise the loss of the "sole witness" might allow murderer to escape).

death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.").

The only authorities Respondent cites that even arguably invokes an equitable rationale is *McDaniel v. State*, 16 Miss. 401 (1847), and *State v. Thomas*, 64 N.C. 74 (1870). *See* Resp't Br. 21-22. However, in *McDaniel* the equitable rationale consists of one sentence at the end of a discussion of the traditional necessity rationale and the traditional trustworthiness requirement that the declarant must be aware of impending death. 16 Miss. at 415-16. In *Thomas*, the equitable rationale consists of one sentence of dictum in a case that did not involve any dying declaration. 64 N.C. at 75. Two oblique sentences in cases decided sixty and eighty years, respectively, after the Framing are not persuasive evidence of the Framing-era rationale for the dying declaration rule, especially in view of the dozens of much earlier authorities that ground that rule in necessity/reliability rather than equity.

The trustworthiness requirement was crucial. As Professor Friedman concedes, "the cases admitting statements under a 'dying declaration' exception, usually articulated a trustworthiness rationale, based on the imminence of apparent death." Friedman Br. 22. Hearsay statements were never admitted as dying declarations in the absence of proof that the declarant was aware of the imminence of death. *See supra* Part I.A; NACDL Br. 17-22. Respondent attempts to explain away the trustworthiness requirement by asserting that it reflected only a hearsay concern, not a confrontation concern. Resp't Br. 23. This "distinction" is pure

invention. None of the authorities that Respondent cites suggests that there is one forfeiture or dying declaration exception for hearsay purposes but a different one for confrontation purposes.

There is no substance to Respondent's claim that the forfeiture-by-causation rule created by the court below even resembles the dying declaration exception. As *Crawford* observed, the dying declaration exception is "*sui generis*." 541 U.S. at 56 n.6. The historical cases and other authorities refute the assertions of Respondent and its *amici* that there is historical justification for an expansive equitable principle that defendants forfeit their confrontation rights where there is no finding or evidence that defendants killed for the purpose of witness-tampering, simply because they are alleged to have killed a victim.

As *Crawford* also teaches, the scope of the confrontation right is limited by the hearsay exceptions that were recognized at the time of the Framing. 541 U.S. at 54. Valid dying declarations would be an allowable exception to the confrontation right only because historically such declarations were admitted into evidence when the settled requirements for such declarations were met. Thus, the scope of the dying declaration exception to the Confrontation Clause should be understood to be coextensive with, and limited to, the common law dying declaration hearsay exception. It makes no sense to say that Ms. Avie's testimonial statement is admissible because it resembles the common law dying declaration exception or the common law forfeiture exception, even though those historical

exceptions would not have covered Ms. Avie's statement.

## II. FEDERAL RULE OF EVIDENCE 804(b)(6) CONFIRMS THAT THE COMMON LAW OF FORFEITURE REQUIRED AN INTENT TO INTERFERE WITH THE JUDICIAL PROCESS

Respondent and its *amici* claim that Rule 804(b)(6) has no bearing on the forfeiture doctrine because it simply codified a hearsay rule, not the common law forfeiture doctrine that extinguishes confrontation claims. *See* Resp't Br. 34-35; Br. of Illinois *et al.* as *Amici Curiae* in Support of Resp't 18-22 [hereinafter Illinois Br.]. This is flatly contrary to this Court's observation in *Davis v. Washington*, 547 U.S. 813, 833 (2006), that Rule 804(b)(6) "codifies the forfeiture doctrine." The lower courts have taken the same view. *See, e.g., People v. Stechly*, 870 N.E.2d 333, 350 (Ill. 2007) (noting that this Court in *Davis*, as well as numerous lower courts, have found that "Rule 804(b)(6) and its intent requirement reflect the common law equitable doctrine"); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000) ("[t]he doctrine that a defendant may waive his or her constitutional right to confront witnesses by misconduct has been codified in Rule 804(b)(6)").[4]

[4] The lower courts' statements on this point clearly show that they view Rule 804(b)(6) as a codification of the common law forfeiture rule that extinguishes confrontation claims. *See, e.g., United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005) (stating that Rule 804(b)(6) "codifies the common law doctrine of forfeiture by wrongdoing"); *State v. Alvarez-Lopez*, 98 P.3d 699, 704 (N.M. 2004) (recognizing that Rule 804(b)(6) codifies the constitutional forfeiture doctrine); *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000) ("Rule 804(b)(6) . . . represents

Neither respondent nor its *amici* cite any authority to the contrary.

It was plainly the intention of the Advisory Committee on the Federal Rules of Evidence to decide "whether it should codify the *generally recognized principle* that hearsay statements become admissible on a waiver by misconduct notion when the defendant *deliberately causes* the declarant's unavailability." Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5, 1995, 1995 WL 870911, at *3 (emphasis added).[5] Additionally, in both of the murder cases cited by the Committee in its published notes to Rule 804(b)(6), the forfeiture rule was applied when the defendant murdered the witness for the specific purpose of preventing the witness's testimony. *See* FED. R. EVID. 804(b)(6) Advisory Committee Note, 163 F.R.D. 91, 157 (1996)

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the codification, in the context of federal hearsay rules, of [the] long-standing doctrine of waiver by misconduct."); *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) ("Rule 804(b)(6) was intended to codify the waiver-by-misconduct rule as it was applied by the courts at that time."); *United States v. Ramirez-Guardado*, 292 F. Supp. 2d 827, 830 (E.D. Va. 2003) (Rule 804(b)(6) "codified the already existing common law forfeiture-by-misconduct doctrine"); *Commonwealth v. Edwards*, 830 N.E.2d 158, 166 (Mass. 2005) (same).

[5] The Committee debated the following four issues regarding the rule: "the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision." May 4-5 Advisory Committee Minutes, *supra*, at *3.

(citing, *inter alia*, *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) and *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982)).

There is likewise no substance to the assertion in one *amicus* brief that the intent-to-prevent-testimony requirement was the minority position of the federal courts before Rule 804(b)(6) was adopted. *See* Illinois Br. 23.[6] The forfeiture rule has always been a rule about witness tampering. That is why Wigmore justified the rule on the ground that "any *tampering with a witness* should once [sic] for all estop the tamperer from making any objection based on the results of his own chicanery." 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1405, at 120 (2d ed. 1923) (emphasis added). That is why the Court in *Davis* described the rule in terms of defendants who "seek to undermine the judicial process" by "acting in ways that destroy the integrity of the criminal-trial system." 547 U.S. at 833. And that is why the Federal Rules of Evidence, and the "as many as forty-one" state evidence codes patterned

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[6] It is telling that Respondent's *amicus* can identify only two cases that even arguably do not involve witness-tampering, *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) and *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985), *see* Illinois Br. 24 n.7. Those cases do little to assist *amicus*' argument. The Second Circuit's ruling in *Miller* predated its ruling in *United States v. Dhinsa*, 243 F.3d at 651-53, 656-58, which clearly required intent to prevent testimony. The Eleventh Circuit's ruling in *Rouco* relied on its previous ruling in *Thevis*, which clearly required specific intent to prevent testimony. 765 F.2d at 995, *citing Thevis*, 665 F.2d at 630.

on those rules, Resp't Br. 39-40, all define forfeiture in terms of witness-tampering.

## III. PUBLIC POLICY FAVORS CONTINUED ADHERENCE TO THE COMMON LAW FORFEITURE RULE

Unable to justify the lower court's open-ended exception to the confrontation right through doctrine or history, Respondent and its *amici* fall back on a policy argument[7] for rejecting the common law rule—that a broad forfeiture-by-causation exception is necessary for the successful prosecution of domestic violence cases.[8]

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[7] Clearly, no court's *post hoc* considerations of public policy can override the Confrontation Clause—a "procedural guarantee," *Crawford*, 541 U.S. at 42, intentionally adopted to prevent the "use of *ex parte* examinations as evidence against the accused." *Id.* at 50. *See id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design."); *Davis*, 547 U.S. at 833 ("We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."); *W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); 1 ANNALS OF CONG. 439 (1789) ("If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.") (statement of James Madison).

[8] This argument bears a striking similarity to the justification offered to Sir Walter Raleigh for refusing him access to his accusers, namely that "many horse stealers should escape if they may not be condemned without witnesses." *Raleigh's Case*,

Like the Confrontation Clause generally, the strict limits of the common law forfeiture rule are not designed to make convictions easier to obtain; rather, they are designed to exclude, except in narrow circumstances, evidence untested by cross-examination. But alternative mechanisms for proving domestic abuse exist that are fully consistent with our constitutional commitment to offering the accused a chance to confront and cross-examine his accusers. Respondent's and its *amici*'s premise—that the right to confrontation should be cut back in the interest of securing domestic violence convictions through the use of untested testimonial hearsay—is thus incorrect for several reasons.

First, the requirements of the common law forfeiture rule will be satisfied in a large number of domestic violence cases. Under that rule, a court may infer intent to interfere with the judicial process where a defendant's actions evidence a purpose to render a complaining witness unavailable through physical or emotional domestic abuse. Thus, where a defendant induces a witness-victim not to testify through threats, intimidation, bribery, or perhaps even promises of reconciliation, the witness-victim becomes "absent by [the defendant's] own wrongful procurement, [and] he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Reynolds v. United States*, 98 U.S. 145, 158 (1878). *See, e.g., Steele v. Taylor*, 684

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2 How. St. Tr. 1, 18 (1603). That justification plainly has been rejected by this Court. *See Crawford*, 541 U.S. at 43-44.

F.2d 1193, 1201 (6th Cir. 1982) ("Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege.").[9]

Second, and more generally, prosecutors are equipped to respond to the problems of witness recantation and absenteeism by proving guilt through physical evidence, statements that do not implicate the defendant's constitutional rights, and expert testimony. *See* Joanne Belknap & Dee L.R. Graham, U.S. Dep't of Justice, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables* 168-69 (Aug. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf (reporting that in up to 90 percent of cases, prosecutors are able to secure domestic violence convictions through the introduction of, *inter alia*, crime scene and victim photographs, police testimony, emergency 911 calls, and the testimony of witnesses other than the victim).[10]

This is not to say the Court should in this case definitively resolve which methods of proving domestic abuse implicate the Confrontation Clause. Rather, the point is that there exist a number of

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[9] In this case, as previously noted, the appellate court below agreed that defendant had not killed Avie for the purpose of preventing her testimony. J.A. 20.

[10] Of course, police testimony, like all other forms of testimonial evidence, is now subject to the limitations imposed in *Crawford* and *Davis*.

methods of proving domestic abuse that do not raise constitutional concerns; that prosecutors continue to innovate in this area; and that *amici's* contention that the Court confronts a choice between protecting domestic violence prosecutions and preserving the Confrontation Clause is overblown.

There are also weighty policy considerations on the other side of the balance. One such consideration is that adoption of the lower court's unmoored "equitable" forfeiture rule would unavoidably open a Pandora's Box, with effects far beyond homicide cases. In stating its test, the lower court made clear that its rule was not limited to homicide but purports to reach every case of genuine unavailability of witnesses "caused by the defendant's intentional criminal act," when supported by "independent corroborative evidence." *Giles*, 152 P.3d at 446; J.A. 64. *See, e.g.*, Resp't Br. 36 (arguing that forfeiture-by-causation theory would apply, "for example, in domestic-violence cases that represent a serious problem"); Brief of the Domestic Violence Legal Empowerment and Appeals Project *et al.* as *Amici Curiae* in Support of Resp't 32 (same). Even if forfeiture were limited to cases in which the witness's unavailability is caused by the defendant, courts inevitably will be faced with efforts to protect witnesses from the rigors of testifying on the ground that defendant caused them to become psychologically unavailable to testify. And the courts will be required to define what constitutes "unavailability," and what constitutes sufficient causation, without any relevant guidance beyond what result is "equitable." It is hard to imagine that the Framers, who chose not "leave the Sixth

Amendment's protection to . . . amorphous notions of 'reliability,'" *Crawford*, 541 U.S. at 61, would have found bald appeals to "equity" any more reliable a guide.[11]

Moreover, at least one *amicus* does not even limit the doctrine to forfeiture by causation: "[T]here is no valid distinction between the actions of a defendant that cause a witness's unavailability and those that take advantage of a vulnerable witness's prospective unavailability." NACC Br. 19. Respondent itself argues that *Reynolds* does not even require an intentional act by the defendant, but merely a "voluntary" one. Resp't Br. 28.

By contrast, the common law rule sets easily-administered boundaries on when a defendant may not demand confrontation. The inquiry is straightforward. Courts conduct a hearing outside the presence of the jury and require the government to prove that the defendant intended to prevent the witness from testifying. *See, e.g., United States v. Johnson*, 219 F.3d 349, 355-56 (4th Cir. 2000). Such hearings, which focus on whether the defendant entertained a purpose to interfere with the judicial

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[11] Indeed, Respondent offers only the vaguest suggestion as to when courts should find a forfeiture of confrontation rights. Without citation or any connection to the traditional forfeiture rule, Respondent asserts that "the most logical equitable considerations" are "the seriousness of the defendant's wrongdoing, the apparent predictability of the victim's absence, and the seriousness of the charged crime. Other considerations might include the defendant's motive and the nature of the victim's evidence. The balance of such factors in an ambiguous case might be a delicate one." Resp't Br. 12-13.

process, are a familiar feature of pre-trial practice, especially in light of Rule 804(b)(6). *See, e.g., Johnson*, 219 F.3d at 349; *Thevis*, 665 F.2d at 624, 630; *Mastrangelo*, 693 F.2d at 273.

An additional concern raised by the broad forfeiture doctrine advanced below is its deeply corrosive effect on defendants' right to proof beyond a reasonable doubt. Under the California Supreme Court's formulation, the trial judge in a preliminary hearing determines the forfeiture question by deciding, by a preponderance of the evidence, whether the defendant was guilty of the underlying crime. The victim's prior hearsay testimony, once admitted, forms the basis for a jury instruction such as the one given in this case, which directed the jury that it could infer Petitioner was predisposed to commit violent crimes, and that he was "likely to commit and did commit" such offenses, *See* Pet. Br. 4 n.3 (citing the Clerk's Transcript at 92). Thus, by the time the jury is left with the case, it has heard both the un-cross-examined statement of the victim implicating the defendant, and an instruction from the court that it may infer both a criminal predisposition and the ultimate fact to be proved at trial.[12] Moreover, even aside from the instruction, a victim's accusatory hearsay statements are likely to be highly influential evidence in many trials. Allowing such evidence to be admitted based on a

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[12] State evidence rules supply few guarantees that such testimony will be accurate or unbiased. Here, for example, Brenda Avie's statements were admitted against Petitioner notwithstanding her demonstrated hostility to him. *See* J.A. 34-35.

judge's preponderance-of-the-evidence finding of guilt on the forfeiture issue comes perilously close to making the judge's finding the "main event" and rendering the jury's determination a foregone conclusion.

Such a proceeding is inconsistent with the design of the Constitution. First, it strongly resembles "the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused" that formed "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. In addition, for all practical purposes the dispositive decisionmaker in the proceeding is the judge. If the judge finds "forfeiture" on the part of the defendant, this finding permits the jury to be exposed to a flood of often highly prejudicial and impossible to cross-examine evidence, which would render even a well-founded claim of self-defense difficult to believe.

Under the traditional witness-tampering conception of the forfeiture doctrine, by contrast, the issue for the judge to decide at the preliminary hearing is not whether the defendant committed the underlying crime for which he is charged, but is typically the discrete question of whether the defendant's motivation was to prevent the alleged victim from giving testimony. That issue would arise in far fewer cases and would not ordinarily focus on the ultimate issues to be decided by a jury under the beyond-a-reasonable-doubt standard.

There are, to be sure, costs to the kind of criminal process envisioned by the Framers. Requiring live, in-court testimony may at times make

it harder for prosecutors to win close cases and may stymie the policy, reflected in California's evidence code, of prosecuting suspected wrongdoers through any and all available evidence. But the Sixth Amendment embodies a near absolute policy against the use of testimonial statements in the absence of an opportunity for confrontation, and the very purpose of the Confrontation Clause is to prevent the state from influencing the jury through evidence that is constitutionally unreliable because it has not been tested by cross-examination.

## CONCLUSION

For the forgoing reasons, the decision of the California Supreme Court should be reversed.

Respectfully submitted,

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April 10, 2008

# AMICUS CURIAE BRIEF

7

No. 07-6053

3-26-08

In The

# Supreme Court of the United States

DWAYNE GILES

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of California**

## *AMICUS CURIAE* BRIEF OF THE BATTERED WOMEN'S JUSTICE PROJECT AND OTHER DOMESTIC VIOLENCE ORGANIZATIONS IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICI CURIAE*[1]

The Battered Women's Justice Project ("BWJP") provides training and resources for advocates, battered women, legal and justice system personnel, policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the United States Department of Justice. Many other domestic violence organizations, whose statements are appended hereto, share the BWJP's interest in the affirmance of the ruling below and join the BWJP as *amici curiae*.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice of the intent to file at least 10 days prior to the due date of this brief. Letters reflecting such notice and consent have been filed herewith.

The resolution of the Question Presented will have a profound effect on the prosecution of domestic violence homicides. Due to the ongoing pattern of abuse invariably preceding such murders, and the inherently intimate nature of the relationship between the accused and the victim in domestic violence homicides, it is often the case that a victim's testimonial statements made prior to her killing will be the most probative evidence of the murderer's guilt. The BWJP and the other domestic violence organizations have a strong interest in preventing domestic murderers from silencing the voices of their victims by improper resort to the Confrontation Clause.

## SUMMARY OF ARGUMENT

Adding a specific intent requirement to the forfeiture by wrongdoing doctrine would be particularly improper in cases of domestic violence homicide. Domestic violence homicides occur within a history of violence, domination, and control. By its nature, a batterer's violent and coercive course of conduct carries with it an intent to silence his significant other. Indeed, domestic violence homicide is the ultimate act of silencing. A specific intent requirement would only further the batterer's campaign to silence his murdered victim's voice, trammeling on fundamental principles of equity.

The dynamics of domestic violence homicides compromise the truth-seeking function of the criminal adversary system, making the use of extrajudicial statements in such prosecutions

necessary to achieve the appropriate balance and allow the victim's voice to counter that of the batterer. Requiring a showing of specific intent would render many victims' statements inadmissible, and thus compel the inequitable result of allowing a batterer to control the content of the proceedings in a way that would further the domination and control he had exercised over his victim before he killed her.

A defendant forfeits his right to confront a witness against him at trial where his wrongdoing causes that witness to be unavailable for cross-examination —whether or not his specific intent at the time of the killing was to keep the victim from testifying against him. Thus, where a domestic violence homicide victim's testimonial evidence is otherwise admissible under state or federal rules of evidence, a murderer may not use the Confrontation Clause to silence his victim's voice. Rather, at the trial of her killer, under the forfeiture by wrongdoing doctrine, the Constitution allows a murder victim to speak from the grave by permitting a prosecutor to introduce evidence of relevant statements she made prior to her death. Narrowing the forfeiture by wrongdoing doctrine, by grafting onto it a "specific intent" requirement that would limit "wrongdoing" to intentional witness tampering, will make many domestic violence homicide prosecutions nearly impossible, leading to absurd and inequitable results that a balanced adversarial system cannot tolerate.

To require a showing of specific intent in order to apply the forfeiture by wrongdoing doctrine in domestic violence homicides would be inconsistent

with timeless principles of law and equity. Such principles counsel that the forfeiture by wrongdoing doctrine applies where a defendant's wrongdoing causes a result, the reasonably foreseeable consequence of which is the unavailability of the witness. Petitioner presents no historical authority or fair-minded argument against constructive forfeiture that would compel imposing a specific intent requirement upon the forfeiture by wrongdoing doctrine in cases of domestic violence homicide.

The decision of the California Supreme Court should be affirmed.

## ARGUMENT

### THE FORFEITURE BY WRONGDOING DOCTRINE PROPERLY ALLOWS VICTIMS OF DOMESTIC VIOLENCE HOMICIDE TO SPEAK FROM THE GRAVE AND PROVIDE TESTIMONY AGAINST THEIR MURDERERS.

The cramped interpretation of the forfeiture by wrongdoing doctrine advanced by Petitioner and his *amici* Defense Lawyers would lead to an absurd and inequitable result. The rule they advocate would exclude otherwise admissible evidence of guilt from a domestic homicide victim prior to her death at the hands of the accused, because the batterer is "deprived" of the ability to cross-examine her at trial. The Constitution compels no such result.

## I. PROPER APPLICATION OF THE FORFEITURE BY WRONGDOING DOCTRINE INCORPORATES AN UNDERSTANDING OF THE RELATIONAL CONTEXT AND DYNAMICS PRECEDING DOMESTIC VIOLENCE HOMICIDES.

Domestic violence is a profound and debilitating social problem with far-reaching consequences.[2] Crimes of domestic violence account

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[2] *Amici* define domestic violence as the physical, sexual, psychological and/or emotional abuse and coercive control of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 300 (2004); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994). Although such violence does occur in same-sex relationships and can be committed by women, the vast majority of domestic violence victims are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Crime Data Brief: Intimate Partner Violence, 1993-2001* 1 (NCJ 197838, Feb. 2003) (reporting that women are 85% of victims). Estimates of the number of American women assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million. *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalance, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (NCJ 183781, Nov. 2000); *see also* AMERICAN PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL

for a substantial portion of criminal justice caseloads, and, most significantly, of homicide cases.[3] Domestic violence homicides constitute nearly one out of every three homicides committed against women,[4] and this rate has been increasing over time.[5] It is crucial that legal policy thoughtfully address the true nature and effects of these crimes in the application of the Confrontation Clause to domestic homicides.

Domestic violence homicides occur within a context of violence, domination, and control. Batterers commit murder as final expressions of control and mastery over their intimate partners.[6]

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TASK FORCE ON VIOLENCE AND THE FAMILY 10 (1996). At least half of all women murdered in the United States are killed by an intimate partner. Violence Pol'y Center, *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005) (92% of female victims murdered by someone they knew; 62% killed by husbands or intimate partners).

[3] *See* Violence Pol'y Center, *supra*, at 3. Nationally, an average of three women are murdered by their husbands or boyfriends every day. Sen. Joseph R. Biden, Jr., Subcomm. on Crime, Correction, and Victims' Rights, *10 Years of Extraordinary Progress: The Violence Against Women Act* 30 (2004).

[4] The FBI reports that in 2006, 32.2% of female homicide victims were murdered by a spouse or boyfriend. U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States 2006: Expanded Homicide Data* (Sept. 2007).

[5] James Alan Fox & Marianna W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (2007) (reporting a gradual increase of four percentage points since 1980).

[6] *See* NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 207 (1999); *see also* STARK, *supra*, at 276-77.

Literally and figuratively, domestic homicide is the total silencing of a victim by her batterer. There is little doubt that most domestic homicide offenders intend to subjugate and silence their victims for all purposes through the act of murder.[7]

Batterers typically engage in ongoing patterns of both psychological and physical abuse, with the intent to exert power and control over victims in all aspects of their lives. As one leading study notes:

> Despite the dramatic nature of physical assault, the single most important risk factor for gendered homicide is the level of entrapment established when physical domination through beatings and sexual assault (rape) is supported by intimidation, isolation, and control over money, food, sex, work, and access to family and friends.[8]

In nearly every case, domestic homicides are the final chapter in long histories of violence by the

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[7] *See generally* DAVID ADAMS, WHY DO THEY KILL? (2007). It also is worth noting that enormously popular public education campaigns employed by domestic violence programs throughout the United States are "Silent Witness" exhibits, which consist of life-size wooden cut-outs of domestic homicide victims, each bearing a written narrative documenting that victim's specific experience with domestic abuse and murder. The campaigns are premised on the understanding that, all too often, victims' experiences and stories are silenced by their batterers.

[8] EVAN STARK & ANNE FLITCRAFT, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH 146 (1996).

abusers/murderers against their victims.[9] For this reason, the relationship between a domestic

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[9] *See, e.g.*, ANN JONES, NEXT TIME, SHE'LL BE DEAD 87-96 (1994); CAL. WELF. & INST. CODE § 18290 (West 2005) ("[In many cases] acts of domestic violence lead to the death of one of the involved parties."). Battered women's advocates and scholars report that some history of violence is present in almost all domestic violence-related homicides. One study found that 86.6% of women killed by their intimate partners experienced violent victimization at the hands of their partners prior to their deaths. *See* WEBSDALE, *supra*, at 81-82. The researcher further notes, "As my analysis of the microdynamics of domestic homicide reveals, there is a clear relationship between everyday and life-threatening interpersonal violence on the one hand and domestic homicide on the other." *Id.* at 204; *see also* ADAMS, *supra*, at 163 (reporting that of domestic murderers interviewed, "nearly all the killers had committed past physical and verbal assaults toward the women they murdered"). Another study reports that domestic abusers made prior threats to their homicide victims in at least 74% of cases. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Cases: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 7 (2003). This phenomenon has been routinely studied by state and local Domestic Violence Fatality Review Teams (FRTs). These multidisciplinary teams, which examine data known about parties prior to homicides, are usually government-sponsored and statutorily created. Various FRTs report that, at a minimum, anywhere between 45% and 67% of the fatalities reviewed included prior incidents of violence. *See, e.g.*, Office of the Mayor's Office to Combat Domestic Violence, *Annual Report of the New York City Domestic Violence Fatality Review Committee* (Dec. 2006) (reporting that 45% of studied parties' families knew of prior incidents of domestic violence); San Diego County's Health and Human Services Agency's Office of Violence Prevention, *County of San Diego Domestic Violence Fatality Review Team 2004 Report* (2004) (reporting formally documented histories of domestic violence between the parties in 67% of the cases studied).

homicide and the history of abuse between the parties cannot be assessed as a series of discrete and disconnected episodes, but, rather, must be recognized as an ongoing continuum of violence.[10] The homicide is the culmination of a single, violent, and tragic story—not a discrete event lacking history. Indeed, "the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts."[11]

The 1985 murder of Yolanda Silva at the hands of her boyfriend, Federico Gonzalez, illustrates this point perfectly.[12] Throughout their relationship, Gonzalez routinely beat Silva severely and often confined her to the bedroom.[13] Her injuries became so severe that she eventually was unable to work.[14] Two days before Silva's death, a

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[10] WEBSDALE, *supra*, at 82. *See generally* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

[11] STARK, *supra*, at 94.

[12] *See California v. Gonzalez*, No. D044037, 2005 Cal. App. Unpub. LEXIS 5065 (Cal. App. 4th June 10, 2005).

[13] *Id.* at *5-6 ("[A witness] described a living situation where Silva was beaten by Gonzalez on a regular basis. Gonzalez would beat Silva in the bedroom they shared, and then forbid Silva to leave the bedroom . . . . During the beatings, Gonzalez would yell at Silva to hurry up and cook meals for him and to help [the witness] around the house. He would call Silva 'whore' and 'slut.'").

[14] *Id.*

witness described her as "all beaten up . . . . Her face was all bruised up. She couldn't talk. She couldn't walk. She was in a lot of pain, holding her stomach . . . ."[15] The witness knew Silva was hemorrhaging because blood was coming from her mouth and she vomited dark blood.[16] On the day Silva died, witnesses stated that Gonzalez had been beating Silva all day. They heard crying and screaming, and one witness looked into the bedroom and "saw blood on the walls" and "Gonzalez was leaning over Silva's body; Silva was moaning and gasping for air."[17] When the witness stopped hearing the moaning, she concluded Silva had died. A jogger later found Silva's body "lying in debris in a rural area of Escondido."[18]

The inseparability of a domestic homicide and a history of abuse challenges the conventional conceptions of crime as a single, isolated event.[19] This traditional concept of crime, which thoroughly pervades the criminal justice system, fails to account for the realities of battering, and has created enormous hurdles for the successful prosecution of domestic violence.[20] Overlooking the context and

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[15] *Id.* at *6-7 (internal quotation marks omitted).

[16] *Id.*

[17] *Id.*

[18] *Id.* at *7.

[19] BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "crime" as "a positive or negative *act* in violation of penal law") (emphasis added).

[20] *See generally* Mary Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective*

history surrounding these crimes too often has resulted in the system's inability to adequately protect victims of domestic violence. The realities of battering result in the silencing of the victim within the criminal justice system, a silencing then brought to completion by the victim's murder.

## II. A SPECIFIC INTENT REQUIREMENT WOULD UPSET THE BALANCE NEEDED FOR THE CRIMINAL JUSTICE SYSTEM TO FUNCTION IN A FAIR, EQUITABLE AND EFFECTIVE MANNER.

A domestic homicide victim's statements of prior violence and threats by her batterer provide crucial evidence relating to her murder. Admission of such statements ensures a balanced application of justice in our criminal adversary system. To impose a specific intent requirement upon the forfeiture by wrongdoing doctrine would only serve to reward the most violent of batterers—those who kill.

### A. An Effective Criminal Justice System Requires the Use of Extrajudicial Statements in Domestic Violence Homicide Prosecutions.

The realities of battering and domestic violence homicides have forced prosecutors to be resourceful in identifying and obtaining a variety of evidence to prove the guilt of a murderer.

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*Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 1 (1991).

Recognizing the unique characteristics presented by domestic violence homicides, prosecutors have developed "evidence-based" prosecution. Evidence-based prosecution emphasizes the gathering of reliable evidence, such as 911 tapes, photographs, medical records, admissions by a defendant, statements of relatives or neighbors, and police observations, in order to build a case that does not depend upon the participation of the victim. Utilizing long-accepted exceptions for excited utterances, medical treatment statements, and present sense impressions, prosecutors attempt to hold batterers accountable for their criminal conduct, even in the absence of the victim. It is neither possible nor safe to require victims to testify at trial in every domestic violence case, and, of course, impossible in a homicide case. Evidence-based prosecution is the most effective means of furthering the compelling public interest in bringing violent abusers to justice, while ensuring that victims are protected as much as possible.[21]

The prosecution of a domestic violence homicide is far different from the prosecution of other homicides.[22] In a domestic violence homicide,

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[21] Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 311 (1993); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1858 (Apr. 2002); Corsilles, *supra*, at 877-78.

[22] Prosecutors recognize the difficulty in prosecuting domestic violence as compared to other crimes. Many prosecutors' offices have divisions dedicated solely to the prosecution of domestic violence, *e.g.*, Colorado Springs DVERT

the defendant and the victim necessarily knew each other on an intimate level. They shared a complicated and *private* history, permeated by a pattern of escalating violence perpetrated by the batterer/defendant.[23] When the batterer's violence escalates to killing the victim, the relationship between the defendant and the victim necessarily plays a key role in both the prosecution and the defense of the case.[24] For the prosecution, the relationship is crucial to presenting its case-in-chief, as it relates to issues of motive and intent.[25] For the defense, in many domestic violence homicide cases

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project; Brooklyn District Attorney's Office Family Violence Center; San Diego City Attorney's Office Domestic Violence Unit. State and local judiciaries acknowledge the challenges in such prosecutions by hearing domestic violence cases in dedicated domestic violence courts. The prosecutors, judges, and court staff receive specialized training to enable them to best handle the complexities present in domestic violence cases.

[23] *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (2003); WEBSDALE, *supra*, at 204.

[24] *See, e.g., United States v. Mayhew*, 380 F. Supp. 2d 961, 965-68 (S.D. Ohio 2005) (statements made by dying witness (defendant's daughter) not admitted under "dying declaration" rule, only allowed under forfeiture by wrongdoing application); *Minnesota v. Crowsbreast*, 629 N.W.2d 433 (Minn. 2001) (court admitted prior statements of victim to demonstrate a pattern of domestic abuse for heightened first degree domestic abuse murder charge).

[25] *See, e.g., California v. Romero*, 149 Cal. App. 4th 29, 40 (Cal. Ct. App. 2007) (court admitted statement by witness that deceased had told witness that Romero had threatened to kill him if Romero ever found him with someone else).

(including this case), the defendant chooses to present evidence of the relationship in an attempt to limit or avoid liability.[26] While he admits that his actions caused the death of the victim, the defendant introduces evidence to prove that his actions somehow were justified (*e.g.*, self-defense)[27] or lacked the requisite *mens rea*.[28] In these and other cases, the effective prosecution of domestic violence homicide requires that prosecutors be able to conduct evidence-based prosecutions and make use of victims' extrajudicial statements.

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[26] *See, e.g., United States v. Garcia-Meza*, 403 F.3d 364, 368 (6th Cir. 2005) (defendant admitted to responsibility of wife's death, but claimed he was not guilty of first degree murder).

[27] *See, e.g., Romero*, 149 Cal. App. 4th at 37 (statements of witness admitted to rebut claim of self-defense).

[28] *See, e.g., Michigan v. Bauder*, 712 N.W.2d 506, 517 (Mich. Ct. App. 2005) (defendant used a baseball bat to sexually assault and murder his girlfriend by bashing her head in; at trial, defendant claimed no premeditation; trial court permitted statements of victim describing boyfriend's prior violence and threats under theory that defendant had forfeited his right to confrontation); *Montana v. Sanchez*, No. DA 06-0052, 2008 Mont. LEXIS 27, at *3-4 (Mont. Jan. 31, 2007) (letter by victim detailing fear of murder by defendant admitted under forfeiture by wrongdoing doctrine to rebut defendant's claim of acting in the heat of passion).

### B. The Admission and Consideration of Extrajudicial Statements in Domestic Homicide Prosecutions Preserves Balance in the Adversarial System.

Silencing a homicide victim's statements about her relationship with the defendant subverts the adversarial system by allowing the defendant to present a one-sided and un-checked version of the relationship. To protect the truth-seeking function of the adversarial process, fact-finders should have access to relevant evidence that, but for the defendant's conduct, would have been available through live testimony.

In domestic violence murder prosecutions, a victim's prior statements of abuse are vital evidence, as they often are the only proof of those previous violent acts. Such statements thus are not only highly probative, but indeed are necessary to permit the State a reasonable opportunity to prove its case, by helping to demonstrate intent, motive, or identity, as well as to refute claims of self-defense or accident.[29] Such statements permit the fact-finder to assess a balanced picture of the relationship and of the murder.[30] Were it otherwise, a fact-finder would be left to consider solely the batterer/defendant's

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[29] *See, e.g., Taylor v. State*, 855 So. 2d 1, 18-19 (Fla. 2003) (victim's state of mind relevant if defendant claims self-defense, that victim committed suicide, or that death was accidental).

[30] *See* Statement of Cheryl Hanna, Professor of Law, Vermont Law School (Mar. 11, 2008), appended hereto at A-10.

self-serving depiction of events.[31] Exclusion of a victim's extrajudicial statements would serve to dramatically tilt domestic violence murder prosecutions in favor of *un*truth—that proffered (unchallenged) by the batterer/defendant.

A victim's extrajudicial statements describing prior violent acts and threats demonstrate the connection between domestic violence and domestic homicide. These statements illuminate the nature of the violence and the relationship for the fact-finder and provide valuable evidence that helps satisfy the State's high burden, ensuring that the reality of the crime is truthfully and fairly presented.

The facts of the case before the Court illustrate the potential for the subversion and manipulation of the truth where a defendant is allowed to present a one-sided, unchallenged version of events. In this case, there were no eyewitnesses to the fatal shooting; Petitioner and the victim were the only ones present.[32] The Petitioner chose to testify at trial, admitting that he had shot the victim six times, but claiming that he acted merely in self-defense.[33] In relating his version of the fatal events, the Petitioner repeated statements allegedly made

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[31] *See* Tuerkheimer, *supra*, at 1022.

[32] *California v. Giles*, 152 P.3d 433, 443 (Cal. 2007).

[33] *Id.* Petitioner's claims at trial included: 1) Avie was very jealous of other women; 2) Avie was violent person, had previously shot a man, threatened others with knives; 3) Avie had vandalized his home and car.

by the victim.[34] Thus, partially through the victim's own alleged statements, Petitioner portrayed her as an aggressive, foul-mouthed, jealous, and volatile person.[35]

Such a one-sided presentation of events is contrary to the fundamental fairness of our adversarial system, which the Sixth Amendment is designed to protect. Our adversarial system is "premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on *both* sides of the question.'"[36] In *Crawford*, the Court noted that "adversarial testing 'beats and bolts out the Truth much better.'"[37] It is this aspiration to fully develop all the relevant facts at trial that is fundamental to the balanced and equitable workings of our criminal justice system.[38]

The limited construction of the forfeiture by wrongdoing doctrine advocated by the Petitioner would undermine the integrity of this adversarial process. The prosecution would be limited in its ability to test a defendant's (and other witnesses')

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[34] *Id.* at 444. Petitioner's claims included: 1) Avie knew his new girlfriend was present; 2) Avie claimed she was on her way to kill him and "that bitch;" and 3) Avie charged at him.

[35] *Id.*

[36] *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (emphasis added and citation omitted).

[37] *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (quoting M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713)).

[38] *Accord United States v. Nixon*, 418 U.S. 603, 709 (1974).

testimony, while the defense could present evidence of the relationship and statements of the victim that would go unchallenged. Thus, the defendant's ability to control how the relationship is depicted in the courtroom mirrors his control of the relationship, and of the victim, prior to her murder. The result would be an abundance of false negatives. By drowning out the ability of victims to speak from the grave, a specific intent requirement would have the ill effect of ultimately rewarding batterers who commit the most heinous violence against their victims.[39]

A number of other recent domestic violence homicide cases decided in the wake of *Crawford* and *Davis* vividly illustrate the necessity of introducing evidence of extrajudicial statements as a means of giving voice to the murder victims. The homicide case of Julie Jensen is particularly instructive. On December 3, 1998, 40-year-old mother of two Julie Jensen was "discovered" dead in her bed by her husband Mark. Initially, police suspected suicide as the likely cause of death.[40] Like so many other victims of domestic violence homicide, Julie Jensen had feared that her husband was going to kill her. She reported her suspicions to the police before she died, but Mark was never questioned.[41] So she did something else. Before her death, Julie gave a sealed

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[39] *See* Statement of Paul Dedinsky, Asst. District Attorney, Milwaukee County District Attorney's Office (Mar. 17, 2008), appended hereto at A-12.

[40] Jay Schadler & Susan B. Miller, *Death Foretold*, 20/20 (ABC television broadcast Feb. 29, 2008), *available at* http://abcnews.go.com/2020/Story?id=4359389&page=2.

[41] *Id.*

envelope to her neighbors, telling them that "if anything happens, give it to the police."[42] After her death, the neighbors did provide the envelope to the police.[43] Inside the envelope was a photograph and a letter written by Julie, saying:

> I am suspicious of Mark's suspicious behaviors and fear for my early demise. . . . If anything happens to me, he would be my first suspect. I would never take my life because of my kids—they are everything to me![44]

The photograph depicted a shopping list, written by her husband Mark, containing items such as poisons and syringes.[45] Julie's trusted neighbor's reaction said it best: "I don't think you need anything else. Just read this and you know what happened."[46]

However, in 2002, the letter was ruled inadmissible under the Confrontation Clause, silencing Julie once again and thwarting the prosecution's efforts to bring her husband to justice. That ruling was appealed to the Wisconsin Supreme Court, which reversed and remanded:

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[42] *Id.*

[43] *Id.*

[44] The text of the letter is appended hereto at A-13. An actual copy of the note is available at http://abcnews.go.com/images/2020/ht_julie_letter_080228.pdf.

[45] Schadler & Miller, *supra.*

[46] *Id.*

> [W]e reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused.[47]

The question sent back to the trial court was not one of specific intent. Instead, the simple and equitable question was whether Jensen caused Julie's unavailability to testify. In 2007, Julie Jensen's letter was ultimately ruled admissible.[48] In January 2008, her husband was found guilty of poisoning her by injecting her with antifreeze and then suffocating her, and was sentenced to life in prison.[49] But for the decision of the Wisconsin Supreme Court allowing Julie to speak from the grave, Mark Jensen might have gotten away with murder.

Other examples abound. In *Montana v. Sanchez*,[50] Raul Sanchez fatally shot his girlfriend, Aleasha Chenowith, outside her home. Holding that the defendant forfeited his right to confrontation by reason of his crime, the court affirmed the trial

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[47] *Wisconsin v. Jensen*, 727 N.W. 2d 518, 521 (Wis. 2007).

[48] Schadler & Miller, *supra*.

[49] *Id.*

[50] No. DA 06-0052, 2008 Mont. LEXIS 27 (Mont. Jan. 31, 2008).

judge's decision to allow the prosecution to introduce a crucial piece of evidence: a note written by the victim, portending her murder at the hands of the defendant.[51] Had the Court limited the forfeiture by wrongdoing doctrine in the fashion Petitioner urges, the victim's note would not have been admitted, and the jury would not have learned of the defendant's prior domestic violence history that caused the victim to fear for her life.

In *Colorado v. Moore*,[52] the defendant, weighing 300 pounds, sat on his wife causing her excruciatingly slow death by asphyxiation. If the *Moore* court had excluded the prior evidence of domestic violence, including one incident where defendant had repeatedly pounded the victim's head against the side of their trailer and a second incident where the defendant had stabbed the victim, the defendant would have been unjustly rewarded for succeeding in killing his wife in such a gruesome fashion. Fortunately, the Court held that under the forfeiture by wrongdoing doctrine, "a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case."[53] Citing *Crawford* and the equitable rationale for the rule of forfeiture by wrongdoing, the *Moore* court explained:

> Here, there is no dispute that the victim was unavailable to testify

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[51] *Id.* at *34-35.

[52] 117 P.3d 1 (Colo. Ct. App. 2004).

[53] *Id.* at 5 (citing *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999)).

> because of her death and that her death was the result of defendant's actions. Therefore, we conclude that defendant forfeited his right to claim a confrontation violation in connection with the admission of the victim's statements into evidence.[54]

The court did not require a showing that the defendant's actions were motivated by any specific intent to prevent the victim from testifying at trial.[55]

The same can be said of *United States v. Garcia-Meza*,[56] where the Sixth Circuit recognized that equitable principles counsel that no specific intent requirement be added to the forfeiture by wrongdoing doctrine.[57] The Sixth Circuit held that the defendant's Sixth Amendment rights were not violated when the trial court allowed the jury to hear

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[54] *Moore*, 117 P. 3d at 5.

[55] *Id.*; *see also Kansas v. Meeks*, 88 P.3d 789 (Kan. 2004).

[56] 403 F.3d 364 (6th Cir. 2005).

[57] *Id.* at 369 ("Though the Federal Rules of Evidence may contain [the intent to silence] requirement, the right secured by the Sixth Amendment does not . . . .") (citations omitted); *see also Gonzalez v. Texas*, 155 S.W.3d 603, 611 (Tex. App. 2004) (observing that "we see no reason why the [forfeiture] doctrine should be limited to such cases"); *California v. Ruiz*, No. H26609, 2005 Cal. App. Unpub. LEXIS 6296, at *18-19 (Cal. Ct. App. July 19, 2005) (holding that "if the forfeiture rule is to further the maxim that no one shall be permitted to take advantage of his own wrong, then the motivation for the wrongdoing must be deemed irrelevant") (internal quotation marks and citation omitted).

testimony from police officers describing the wife's statements about a prior assault.[58] The facts in *Garcia-Meza* almost mirror those in the case at hand.[59] Defendant had forfeited his right to confrontation because his wrongdoing unquestionably caused the victim's unavailability,[60] making a showing of "specific intent" was unwarranted:

> The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statement could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.[61]

As these examples demonstrate, a victim's past statements provide crucial evidence of the very events that brought about her demise and cannot be ignored. Such statements represent the final voice

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[58] *Garcia-Meza*, 403 F.3d at 369.

[59] *Id.* Garcia-Meza was charged with the murder of his wife, Kathleen. Five months before her killing, Garcia-Meza assaulted Kathleen. In the murder trial, the district court admitted testimony from the responding police officers about the prior incident. At trial, the defendant admitted killing his wife, but claimed his actions were not premeditated. After his conviction, Garcia-Meza appealed, claiming his constitutional confrontation rights were violated by admission of his wife's prior statements.

[60] *Id.* at 370 (citing *Crawford*, 541 U.S. at 62; *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

[61] *Id.* at 370-71.

of these homicide victims. Requiring a showing of specific intent would create a logical absurdity where the wrongful actions of the batterer subvert and bury the truth. Domestic murder defendants could hide behind the Sixth Amendment and actually be rewarded for their criminal behavior. Not only would the domestic violence victim be buried by the violent actions of the batterer, so would her rightful ability to speak from the grave.

## III. REQUIRING A SHOWING OF SPECIFIC INTENT IN ORDER TO APPLY THE FORFEITURE BY WRONGDOING DOCTRINE IN DOMESTIC VIOLENCE HOMICIDES IS INCONSISTENT WITH TIMELESS PRINCIPLES OF LAW AND EQUITY.

Fundamental notions of what is wrong and what is equitable that were as true at the Founding as they are now make plain that the Confrontation Clause provides no refuge for the murderer who would seek to silence his victim's voice in court. From time immemorial, it has been the case that murder is wrongdoing and that equity confers no benefit on wrongdoers. The interpretation of the Confrontation Clause that Petitioner and the Defense Lawyers urge would allow a murdering batterer to benefit from his crime, an absurd result that the Founders could not have contemplated.

### A. Timeless Principles Do Not Allow a Murderer to Benefit from His Crime.

The law before, during, and after the time of the Founding recognized that murder is wrongful. No less authority than the Ten Commandments, the very "foundation of the rule of law,"[62] tell us so: "Thou shalt not kill."[63] Murder, this Court thus has recognized, is *malum in se*.[64]

Timeless principles of equity that have informed this Court's interpretation of the Confrontation Clause counsel that the forfeiture by wrongdoing doctrine applies where a defendant's wrongdoing causes a result, the reasonably foreseeable consequence of which is the unavailability of the witness. In such a case, the defendant has constructively forfeited his right to confrontation.[65] Where it is the defendant's own

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[62] *McCreary County v. ACLU*, 545 U.S. 844, 906-07 (2005) (Scalia, J., dissenting).

[63] EXODUS 20:13 (King James Version), *in* AMERICAN BIBLE SOCIETY, THE HOLY BIBLE AS PRINTED BY ROBERT AITKEN & APPROVED & RECOMMENDED BY THE CONGRESS OF THE UNITED STATES OF AMERICA IN 1782 (1968). The Aitken Bible has been referred to as the "Bible of the Revolution." It was the very first English-language Bible published in America, as noted in the Foreword and Preface to the 1968 reprinting. *See also* Library of Congress, *Religion and the Founding of the American Republic* (2003), *at* http://www.loc.gov/exhibits/religion/rel04.html.

[64] *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 485-87 (1869).

[65] Another right established in the Sixth Amendment, the right to be present at trial, is subject to constructive

wrongdoing that foreseeably causes his inability to cross-examine his victim, the forfeiture by wrongdoing doctrine mandates that this inability does not violate the defendant's rights under the Confrontation Clause.[66]

Murder is the easy case; it presents the most compelling example of forfeiture by wrongdoing. To murder someone is to prevent her from doing anything—ever. That, of course, includes testifying at trial against her killer as a live witness. Having killed the victim, "there is no doubt that the Defendant is responsible for [her] unavailability,"[67] a reasonably foreseeable result at the time the defendant committed the crime. Where a victim's extrajudicial statements are otherwise admissible, equity does not allow the killer to silence his victim once more, but, rather, demands that the murder

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forfeiture where a defendant engages in wrongful disruptive conduct. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). No showing of "specific intent" to be removed from court is required before a court removes a defendant from the courtroom—the defendant need only engage in conduct sufficiently disruptive to the proceedings. Surely if the right to be present, "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause," *id.* at 348, can be forfeited by objectively wrongful conduct, the right to confront, which possesses no such weight, *Whorton v. Bockting*, 127 S. Ct. 1173, 1182-83 (2007), can be constructively forfeited (*i.e.*, forfeited without any specific intent), as well.

[66] Lower courts acknowledge constructive forfeiture of the right to confrontation. *See, e.g.*, *Clark v. Perez*, 510 F.3d 382, 395-96 (2d Cir. 2008); *United States v. Miller*, 116 F.3d 641, 667 (2d Cir. 1997).

[67] *Garcia-Meza*, 403 F.3d at 370.

victim be able to testify against her killer from the grave.

State court application of the forfeiture by wrongdoing doctrine in domestic murder cases counsels against adding any specific intent requirement. State courts of general jurisdiction are where murder cases are tried, and, in the wake of *Crawford* and *Davis*, an emerging majority of State cases have declined to require "specific intent."[68] The weight of this authority should not be taken lightly. While the Framers surely understood that murder was wrongful in any sense of the word, they just as surely understood that most, if not all, murder cases would be within the general jurisdiction of State courts, not within the limited jurisdiction of Federal courts. Thus, the interpretation of the forfeiture by wrongdoing doctrine and its application by the States to domestic violence homicide prosecutions warrants respect.[69]

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[68] *See, e.g.*, *Sanchez*, 2008 Mont. LEXIS 27, at *34; *Gonzalez*, 195 S.W.3d at 124; *Colorado v. Vasquez*, 155 P.3d 565, 568 (Colo. Ct. App. 2006); *Massachusetts v. Edwards*, 830 N.E.2d 158, 165 (Mass. 2005); *Bauder*, 712 N.W.2d at 513.

[69] *Accord Stanford v. Kentucky*, 492 U.S. 361, 379 (1989).

### B. There Is No Historical Authority or Fair-Minded Argument that Compels Adding a Specific Intent Requirement to the Forfeiture by Wrongdoing Doctrine.

Petitioner and his *amici* Defense Lawyers fail to confront the blatant inequities that their interpretation would produce. While their briefs are long on citations to the inapposite and the ambiguous, they are remarkably short on, and indeed avoid, any meaningful discussion of the absurd implications that their tortured interpretation of the Constitution would yield. Petitioner and the Defense Lawyers fail to confront the wrongfulness of murder in light of the equitable nature of the forfeiture doctrine. Rather than confront the inequities they would have the Court (and the Framers) impose, the Defense Lawyers, like Petitioner, draw the improbable conclusion from their survey of inapt cases that their interpretation is "simply the rule of law" of the "Confrontation Clause as it was written and originally understood."[70]

To the contrary, neither the very best "authority" to which Petitioner and the Defense Lawyers can point, nor their proffered explanation as to why that authority does not include any on-point cases, can justify grafting any specific intent requirement onto the forfeiture by wrongdoing doctrine. Simply put, there is no authority that supports Petitioner's theory that would compel the

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[70] NACDL Br. at 25.

absurd and inequitable result he seeks.[71] Petitioner and the Defense Lawyers simply do not acknowledge constructive forfeiture. Without any authority that directly supports their vision of the common law, Petitioner and the Defense Lawyers are left to cherry-pick language from cases and treatises over the centuries, offering the Court snippets of text that, on balance, are at best ambiguous. Nearly all the proffered language from the old cases, treatises, and dictionaries they cite can be plausibly read to contemplate forfeiture without any requirement of specific intent.[72] Their arguments thus amount to nothing more than the "[f]ine parsing of somewhat

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[71] *Amici* Defense Lawyers try to explain their failure to find truly supportive authority by arguing that "no lawyer [before or at the time of the Founding] ever suggested admitting [a murder victim's] excluded statements on forfeiture grounds is powerful evidence that the rule did not extend so far." NACDL Br. at 16. It is just as plausible, however, that there are no reported cases excluding such evidence because murder victims' pre-murder statements were routinely admitted, without objection. It may well be that defense lawyers did not raise confrontation objections in this situation because, as in the matter currently before the Court, it was obvious from the facts that the murder victim was made unavailable by defendant's conduct, which was plainly wrongful in any sense of the word.

[72] For instance, Petitioner makes much of the verb "procure" as connoting specific intent, but glosses over the fact that the "leading dictionary of the early republic," which he quotes, defines "procure" only as meaning to "cause" or "bring about." Pet. Br. at 27. Perhaps even more compelling is the definition taken from the Oxford English Dictionary, which defines "procure" as meaning, among other things, "to endeavor to cause or bring about (mostly something evil) to or for a person." *Id.*

arcane precedents, over which reasonable judges may disagree."[73]

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Adhering to a narrow forfeiture by wrongdoing doctrine that requires a defendant's specific intent to keep a witness from testifying in a future proceeding not only drowns out the ability of domestic homicide victims to speak from the grave, but also rewards batterers who commit the most heinous violence against their victims. Domestic violence homicide is the ultimate act of silencing. A specific intent requirement would only further the batterer's campaign to silence his murdered victim's voice, trammeling on principles of equity. Imposing a specific intent requirement would act to encourage the most violent criminal behavior, inviting batterers to fatally confront their victims outside the courtroom, so that they might avoid confronting them at trial. The Constitution compels no such result.

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[73] *Danforth v. Minnesota*, 128 S. Ct. 1029, 1058 (2008) (Roberts, C.J., dissenting).

## CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully Submitted,

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# APPENDIX

## Statements of Interested Domestic Violence Organizations

**Arizona Coalition Against Domestic Violence.** *Amicus* Arizona Coalition Against Domestic Violence ("AzCADV") is a non-profit organization comprised of representatives from domestic violence programs and other concerned individuals and groups. This statewide organization strives to increase public awareness about the issue of domestic violence, enhance the safety of, and services available to, domestic violence victims, and reduce the incidents of domestic violence in Arizona families. AzCADV's heavy involvement in combating domestic violence includes monitoring courts, sponsoring legislation, and lobbying in support of (or against) bills that will impact victims and hold perpetrators accountable. AzCADV delivers training and presentations on numerous domestic violence topics across Arizona. In addition, AzCADV operates the state's only legal advocacy hotline for victims, friends, family, and concerned citizens to access support, information, and referrals. AzCADV strongly believes that the key to ending domestic violence is holding perpetrators accountable for their crimes. The organization dedicates itself to making changes in the justice system to ensure that victims are treated with dignity and respect and that abusers are punished appropriately.

**End Violence Against Women International.** *Amicus* End Violence Against

Women International ("EVAW International") was founded in January 2003 to accomplish the goal of educating the general public and public safety workers about the crimes of sexual assault and domestic violence. The organization provides effective, victim centered, multi-disciplinary training, and expert consultation regarding crimes of sexual assault and domestic violence. EVAW International also seeks to identify and disseminate effective primary prevention programs for men, as well as risk reduction programs for women. The primary activity of EVAW International is to provide training, through international conferences, regional training seminars, and an internet-based training curriculum. Each training opportunity focuses on educating community professionals, especially police officers, prosecutors, forensic examiners, victim advocates, other first responders, and community stakeholders, about violence against women and the effective investigation and response to these crimes. The mission of EVAW International centers on improving the criminal justice and community response to crimes of sexual assault, domestic violence, and stalking. Achieving this goal requires implementing reforms that are based on a realistic understanding of the dynamics of these crimes. Otherwise, offenders thwart the process, avoid accountability, and re-traumatize their victims.

**Georgia Coalition Against Domestic Violence.** *Amicus* Georgia Coalition Against Domestic Violence ("GCADV") is a non-profit organization comprised of a network of domestic violence programs in Georgia. Eliminating violence

against women by promoting system change and intervention programs for battered women is the goal of GCADV. The organization provides technical assistance and training on domestic violence to lawyers, judges, law enforcement, probation officers, batterer intervention programs and advocates. GCADV works with other partners throughout Georgia in developing policy, and working to strengthen systems' response to domestic violence. GCADV is deeply committed to achieving a criminal justice response to domestic violence that provides meaningful protection to victims. A strong criminal justice system both deters individuals from committing acts of domestic violence, and strongly influences communities' intolerance toward domestic violence.

**Hawaii State Coalition Against Domestic Violence.** *Amicus* Hawaii State Coalition Against Domestic Violence ("HSCADV") is a private, not-for-profit organization. As a statewide coalition of domestic violence programs, HSCADV ensures the safety and protection of women in intimate relationships by coordinating domestic violence prevention and intervention services in Hawaii. HSCADV provides education and training on family violence, collects resource materials, serves as a clearinghouse, provides technical assistance on family violence matters, and provides facilitation when requested by member agencies. Domestic violence's recent impact on Hawaii is great. In 2007, six women lost their lives as a result of domestic violence, followed by two more domestic violence related murders in early 2008. These women, their

surviving children, family and friends deserve justice.

**Jane Doe Inc., The Massachusetts Coalition Against Sexual Assault and Domestic Violence.** *Amicus* Jane Doe Inc., The Massachusetts Coalition Against Sexual Assault and Domestic Violence ("JDI") is a statewide membership organization of more than sixty community-based sexual assault and domestic violence programs in Massachusetts. JDI brings together organizations and people committed to ending sexual assault and domestic violence. JDI works to transform social norms that are the root causes of this violence and promote safety, justice and healing for survivors. JDI advocates for responsive public policy, raises awareness, promotes collaboration and supports its member organizations to provide comprehensive prevention and intervention services. JDI is deeply committed to advancing and supporting practices, policies and systems that are responsive and promote both liberty and safety for victims of sexual and domestic violence and their children.

**Kentucky Domestic Violence Association.** *Amicus* Kentucky Domestic Violence Association ("KDVA") is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. The organization serves as an advocate for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. KDVA offers training, technical assistance, and consultation on all aspects of domestic violence

advocacy in both the criminal and civil justice systems. The organization's staff provides resources and information on effective prosecution of domestic violence offenders, as well as protection orders, confidentiality issues, divorce and custody, and separation violence.

**Minnesota Coalition for Battered Women, Inc.** *Amicus* Minnesota Coalition for Battered Women, Inc. ("MCBW") is a private, non-profit membership organization in Minnesota which serves as a statewide coalition of local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW has over ninety member programs located throughout all regions of the state. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools and the general public. The member organizations of MCBW, with consultation and assistance provided by MCBW, provide shelter and law advocacy every year to thousands of battered women. MCBW, both directly and in collaboration with member programs, works with law enforcement and prosecutors to provide safety for battered women and their children.

**National Coalition Against Domestic Violence.** *Amicus* National Coalition Against Domestic Violence ("NCADV") was formed in 1978 to provide a national network of programs serving victims of domestic violence. NCADV now has over 2,000 programs currently in the United States.

NCADV provides technical assistance, general information and referrals, community awareness campaigns, and does public policy work at the national level. NCADV has participated in many *amicus* briefs over the years on issues related to victims of domestic violence.

**Nevada Network Against Domestic Violence.** *Amicus* Nevada Network Against Domestic Violence ("NNADV") was founded in 1980 to work toward the elimination of domestic and sexual violence against all persons. NNADV works closely with advocates, judges, legislators, law enforcement officers, and prosecutors in advancing more effective criminal justice system responses to victims and domestic violence offenders. NNADV's member programs share the goal of ending domestic violence through coordinated community response efforts, community education, public policy development, and services for victims. NNADV strongly believes that fairness and justice in domestic violence cases rests on the unwavering principle that domestic violence is a crime for which offenders must be prosecuted and held accountable, and the victims provided meaningful protection. Across the state, communities strive to enforce Nevada's domestic violence laws and provide safety for victims of such violence.

**New Mexico Coalition Against Domestic Violence.** *Amicus* New Mexico Coalition Against Domestic Violence ("NMCADV") is a not-for-profit organization incorporated in the state of New Mexico. Founded in 1981, its mission, along with the

ultimate vision of social justice, is ending violence against women through partnerships, advocacy, and direct services. NMCADV also plays an instrumental role in advocating for laws and policies, locally and nationally, that affect battered women and their children.

**Oklahoma Coalition Against Domestic Violence & Sexual Assault.** *Amicus* Oklahoma Coalition Against Domestic Violence & Sexual Assault ("OCADVSA") is the professional membership organization of Oklahoma based domestic violence and sexual assault victim service providers. Since 1981, the OCADVSA has represented the critical needs of survivors of domestic violence, sexual assault, stalking, and dating violence throughout the state. The organization provides training to professionals, technical assistance to service providers, advocates for legislative change, and promotes public awareness. OCADVSA develops and maintains the state domestic and sexual violence data collection system, houses a comprehensive clearinghouse and library, maintains a domestic violence and sexual assault web-site, and provides support to victim service providers.

**The Safe Haven Shelter for Battered Women.** *Amicus* The Safe Haven Shelter for Battered Women is a Minnesota shelter that provides a safe environment for battered women and their children. The organization provides crisis shelter, systems change work, and community education. In addition, the organization acts as a

legal advocate, assisting with restraining orders and representing victims in civil and criminal court. The Safe Haven Shelter is in the process of creating and opening a regional Family Justice Center.

**Washington State Coalition Against Domestic Violence.** *Amicus* Washington State Coalition Against Domestic Violence ("WSCADV") is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies and strengthen community responses to domestic violence throughout the state. WSCADV's core commitment is to support domestic violence survivors by providing emergency shelter and advocating for laws and public policies that promote safety and justice for domestic violence victims. WSCADV also conducts statewide trainings for law enforcement officers and prosecutors about domestic violence, addresses the needs of domestic violence survivors, and assists local communities to implement best practices in the investigation and prosecution of domestic violence cases.

**Wisconsin Coalition Against Domestic Violence.** *Amicus* Wisconsin Coalition Against Domestic Violence ("WCADV") is a not-for-profit membership organization of battered women, formerly battered women, and domestic abuse programs, all committed to ending domestic violence. Founded in 1978, mission of WCADV is to end violence against women through partnerships,

advocacy, and direct services. The organization plays an instrumental role in advocating for laws and policies that affect battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005. WCADV also leads statewide efforts to research and analyze domestic violence homicide cases. WCADV releases an annual report that details these homicides and addresses various policy implications.

**Women's Safety and Resource Center.** *Amicus* Women's Safety and Resource Center is a private non-profit organization that has been dedicated to serving victims of both domestic and sexual violence since 1979. The center provides emergency shelters for both single women and women with children. It offers clients who need longer term support the opportunity of having an apartment of their own. Advocates provide case management to assist these clients in moving forward with their lives. In addition to housing, the organization provides support groups and a 24-hour hotline and crisis response team, as well as court advocacy for restraining order and stalking order petitions.

## Statement of Cheryl Hanna

I, Cheryl Hanna, am a legal academic, and teach Constitutional Law, Evidence and Domestic Violence Law. I have written extensively about the criminal justice system's response to domestic violence. My work in this area has been widely cited, including by this Court in *Castle Rock v. Gonzales*, 545 U.S. 748, 763 (2005). My interest, in accordance with my academic work, is to encourage the criminal justice system to adequately respond to domestic violence within a constitutional framework. Such an approach preserves the liberty and autonomy of both victims and perpetrators.

I join the other *amici* because I believe that the integrity of the Confrontation Clause is preserved by a Forfeiture by Wrongdoing doctrine that does not require a showing that the specific motive behind the wrongdoing was to render the witness unavailable to testify at trial.

Furthermore, the practical implications of such a doctrine would create significant obstacles in prosecuting domestic violence cases by excluding otherwise reliable evidence necessary to ascertain the truth.

Given that domestic violence offenders typically engage in ongoing patterns of both psychological and physical abuse with the intent to exert power and control over victims in all aspects of their lives, in few cases is there evidence that the specific motive of the wrongdoing was to silence the victim at trial. An interpretation of the Forfeiture by

Wrongdoing doctrine that allows for the admissibility of statements when the defendant has engaged in serious and intentional wrongdoing that predictably renders the witness unavailable more accurately reflects the dynamics of abusive relationships and allows the criminal justice system to effectively prosecute domestic violence offenders.

The ability of the state to hold these defendants accountable provides safety for victims and maintains order in a civil society.

Cheryl Hanna
Professor of Law
Vermont Law School
March 11, 2008

## Statement of Paul Dedinsky

As a sexual assault, child abuse and domestic violence prosecutor for many years, it has been my job to bring terrified victims and witnesses to court where they must face, and testify in front of, their abusers. Sadly, few victims make that courageous journey to the courthouse. Many have succumbed to intimidation and threats. Others believed their abusers' promises, hoping for change and a better life.

Please understand that it is not prosecutors who seek to prevent the statements of victims and witnesses from being tested in the crucible of cross-examination. It is the abusers who ensure that the victims' statements not be tested in either cross or direct examination. Since the *Crawford* decision, our courts have been subjected to abusers who, through repeated control of their victims, control the outcome of their cases. In my jurisdiction, conviction rates have plummeted. Through the intimidation and manipulation of victims, offenders now easily escape accountability.

Paul Dedinsky, Assistant District Attorney
Milwaukee County District Attorney's Office
March 17, 2008

## Letter from Julie Jensen

Pleasant Prairie Police Department,

Ron Kosman or Detective Ratzenburg-

I took this picture and am writing this on Saturday, 11-21-98 at 7AM. This "list" was in my husband's business daily planner—not meant for me to see. I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work and the kids; he's an avid surfer of the Internet . . . .

Anyway, I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol and multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription [sic] for migraine tablets, which Mark uses more than I.

I pray I'm wrong and nothing happens . . . but I am suspicious of Mark's suspicious behaviors and fear for my early demise. However, I will not leave _____ and _____. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), _____ and _____.

Julie C. Jensen

# AMICUS CURIAE BRIEF

3-26-08

No. 07-6053

IN THE

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

On Writ of Certiorari to the
Supreme Court of California

## BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, LEGAL MOMENTUM, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## INTEREST OF THE AMICI[1]

*Amici* are a diverse group of organizations and individuals devoted to combating domestic violence through litigation, legislation, and policy initiatives. *Amici* collectively have decades of experience working with survivors of domestic violence, and have been involved in extensive efforts to improve national and state justice systems' response to these victims.

*Amici* are extremely concerned about the impact a specific intent requirement as grounds for forfeiture of confrontation rights would have on the ability to prosecute batterers who murder their victims. *Amici* are well aware that the vast majority of domestic homicides culminate a history of battering, and that victims' prior statements about the batterer's abuse and threats are often critical to prove the identity or motive of the killer, or to disprove a claim of self-defense or accident. Without these statements, the equitable purpose of the forfeiture by wrongdoing doctrine will be subverted while murderers benefit from their own crimes and go free. For these reasons, *Amici* are submitting this brief in support of respondent.

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *Amici* provided any monetary contribution to its preparation or submission. The identities and interests of *Amici* are described in Appendix A to this brief.

## SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court stated that it accepts the rule of "forfeiture by wrongdoing," under which "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation," *Davis v. Washington*, 547 U.S. 813, 833 (2006), and that this rule "extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62. The Court cited *Reynolds v. United States*, 98 U.S. 145, 158 (1879), which held that the Constitution "does not guarantee an accused person against the legitimate consequences of his own wrongful acts," and, thus, a criminal defendant can forfeit his confrontation right where the witness's unavailability results from the accused's own wrongful conduct.

The equitable forfeiture rule adopted in *Reynolds* and *Crawford*, and the equitable maxim upon which it is based, are fully applicable here, where the defendant is responsible for the victim's absence at trial because he wrongfully killed her. Petitioner and *amicus* National Association of Criminal Defense Lawyers ("NACDL")[2] argue to the contrary based on a misreading of Framing-era and other case law that they claim requires limiting application of forfeiture to cases where the defendant's wrongdoing sprang from a specific intent to interfere with future judicial proceedings. Their argument is incorrect. Neither Framing-era case law and treatises nor consideration of

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[2] References to "petitioner" hereinafter include NACDL, unless otherwise indicated.

fundamental Sixth Amendment principles mandate a specific-intent requirement. On the contrary, as the California Supreme Court carefully and correctly determined, such an intent requirement cannot be squared with either the rationale or the history of the forfeiture doctrine and the equitable maxim upon which it is based.

The core issue here is whether the paradigm of "witness-tampering," which provided the context for Framing-era applications of the forfeiture doctrine, should foreclose application of the equitable doctrine to a modern problem that the Framing-era authorities did not confront: the need to prosecute domestic violence as a serious crime, and to deal with the widespread lack of live witnesses due to defendants' wrongdoing occurring *before* they are actually charged with a crime. While modern domestic homicide cases may not fit the paradigm perfectly, killings such as this one, after prior statements were made to police investigating a prior charge, are closely analogous to traditional witness-tampering cases.

Moreover, while Framing-era courts had no occasion to deal with the problems that domestic violence and murders pose for modern courts, they did deal with an analogous problem: child sexual assaults. In that context, they accepted the admission of unconfronted hearsay statements of the children, who were not permitted to testify. Had they faced the domestic violence and homicide dockets of modern courts, they likely would have applied a similar view of "necessity" and fairness to admit the statements.

Finally, a specific-intent requirement would create a windfall for perpetrators who kill rather than merely assault their victims—the epitome of an *inequitable* result. It would both encourage batterers to kill their victims and defeat the truthseeking function of the criminal process by making prosecution of many domestic murders virtually impossible.

## ARGUMENT

### I. A SPECIFIC INTENT REQUIREMENT FOR FORFEITURE BY WRONGDOING IS INCONSISTENT WITH FRAMING-ERA LAW AND PRACTICE.

Petitioner argues that he should be able to exclude Ms. Avie's past statements based on his "right to confront" the victim who is dead by his own hand. He argues that the very information which would refute his claim of self-defense—her past statements about his intent to kill her—must be excluded to protect his confrontation right, simply because he did not kill her specifically to prevent her testimony at trial. Neither Framing-era authorities nor more modern precedents[3] support such a counterintuitive and troubling proposition.

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[3] Petitioner asserts that no court prior to *Crawford* permitted forfeiture by wrongdoing without finding defendant had a specific intent to interfere with the witness' testimony. Pet. Br. 8. This is untrue. *See, e.g., United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (defendant who murdered undercover federal agent while resisting arrest "waived his right to cross-examine Benitez by killing him"); *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (in RICO case concerning gang murders, "although a 'finding that [defendants'] purpose was to prevent [a declarant from] testifying,' is relevant, such a

### A. Framing-Era Courts And Commentators Focused On Cause, Not Specific Intent, In Applying Forfeiture By Wrongdoing.

Petitioner's claim that there was only one understanding of forfeiture—and that it universally required specific intent—is untenable. Pet. Br. 20-31; NACDL Br. 5-15.

#### 1. Cases

Contrary to petitioner's claim that Framing-era courts required specific intent, the five early cases discussed at petitioner's brief at pp. 22-26 and cited by this Court in *Reynolds,* make *no* mention of specific intent. Rather, without exception, they focus on *causation,* i.e., whether the defendant was responsible for the witness' absence. *See* J.A. 41, n.3.

Thus, in *Lord Morley's Case,* a murder trial, the Lord Chief Justice inquired as to whether "the witness was detained by means or procurement of the prisoner." 6 How. St. Tr. 777 (1666). The prosecution's witness testified that the absent witness had run away and told others that he would not attend Lord Morley's trial. *Id.* at 777. This evidence alone was found insufficient to link the

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finding is not required"); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (defendant killed federal informant for cooperating with the government). *See also Steele v. Taylor*, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982) ("The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right").

defendant to the witness's absence, and the statement was not admitted. *Id.*

In *Harrison's Case,* it was claimed that Harrison *or his agents* had kept a witness away from the trial. 12 How. St. Tr. 833, 851 (1692). The Court required only that the defendant "made him keep away." *Id.* Ultimately, the Court accepted as proof testimony that "a gentleman" had come to offer the witness money "to be kind to Mr. Harrison" and that, later, the witness "was inticed [sic] away by three soldiers" and had not since returned. *Id.* at 851-852. The Court was satisfied that "there has been evidence given of ill practice to take him out of the way." *Id.* at 868. Not only was there no requirement or proof of "specific intent"—there was not even clear proof that the defendant *himself* was involved in the witness's disappearance.

In *Lord Fenwick's Case,* 13 How. St. Tr. 537 (H.C. 1696), the Peers voted to admit the prior deposition of a witness who it appeared had been spirited away, despite the fact that it was noted that "no such thing [that Fenwick had tampered with the witness] hath been proved." *Id.* at 606. The facts appear to demonstrate, at most, that "J. Fenwick, *or his lady,* had a hand in sending Goodman away" and/or that someone not specifically proven to be employed by Lord Fenwick, had a hand in it. *Id.* (emphasis added). Not only was specific intent not required, it was not even clear that Lord Fenwick himself had knowingly "procured" the witness's absence. *Contra,* Pet. Br. 24, n.6.

Finally, in *Drayton v. Wells,* 10 S.C.L. (1 Nott & McC.) 409, 1819 WL 692 (S.C. Const. App. 1819), and *Queen v. Scaife,* 17 Q.B. 238, 117 Eng. Rep.

1271 (1851), the courts again said nothing about specific intent, nor do the facts appear to support such an inquiry. *Drayton* speaks in *dicta* of whether "the witness had been kept away by the contrivance of the opposite party"—a standard which is met purely by a causal link. 1819 WL at *2. And the *Scaife* court refused to allow a witness' earlier testimony against two co-defendants, where only the third co-defendant had been shown to be involved in procuring the witness's absence. 117 Eng. Rep. at 1273. Specific-intent was neither discussed nor at issue.

In short, these Framing-era cases, while clearly involving allegations of witness-tampering, do not in any way support the assertion that forfeiture by wrongdoing requires a "specific intent" to absent a witness from trial. Rather, they embody only a causation-based analysis of forfeiture.

### 2. Treatises

Nor do Framing-era treatises support petitioner's position. *See* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429 (1721) (witness "kept away by the Means or Procurement of the Prisoner"). Petitioner argues that the term "procurement" "clearly connotes a deliberate intent to carry out a specific design." Pet. Br. 26-27. This reads too much into the term. As a matter of ordinary meaning, a witness who is unavailable to testify because the defendant killed her has been "kept away by the means or procurement" of the defendant. Indeed, Webster's 1828 definition of "procure" petitioner cites includes "cause," "bring about," and "effect." Pet. Br. 27. Certainly, defendant's killing of Brenda Avie "caused,"

"brought about," and "effected" her unavailability as a witness at his murder trial. Similarly, Webster's definition of "procurement," "[a] causing to be effected," includes no specific intent requirement. 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

Petitioner further relies on 19th century treatises by Greenleaf, Taylor and Wharton which use the formulation that the witness must have been "kept away" by the accused. *See* Pet. Br. 29-31. As a matter of ordinary English usage (both then and now), petitioner "kept away" Ms. Avie from giving any testimony when he killed her. Nothing in that formulation supports a specific-intent requirement.

### 3. Witness-Tampering Occurred In This Case.

While the early cases do not support a specific-intent requirement, they do reflect that Framing-era courts generally applied forfeiture to cases involving "witness-tampering." This case can reasonably be characterized as fitting within that paradigm. This Court has acknowledged that "examining police officers . . . perform investigative and testimonial functions once performed by examining Marian magistrates." *Davis*, 547 U.S. at 830, n.5. Ms. Avie's statements to the police were thus essentially the modern equivalent of testimony given to a Marian magistrate. When he killed her, defendant knew he was facing someone who had previously talked to the police about his abuse and might well do so again. The statements here therefore mirror the witness-tampering situations commonly addressed in the Marian-era cases more closely than Petitioner suggests.

Indeed, if an "intent" requirement exists, it is readily satisfied here based on the settled Framing-era "maxim that every man shall be presumed to intend the natural and probable consequences of his own act." *Marble v. City of Worcester*, 4 Gray 395, 405, 1855 WL 5865 (Mass. 1855); *Scott v. Shepherd*, 2 W. Bl. 892, 96 Eng. Rep. 525 (King's Bench 1773) ("Every one who does an unlawful act is considered as the doer of all that follows") (De Grey, C.J.). Here, Ms. Avie's unavailability at petitioner's trial was a foreseeable—indeed inevitable—consequence of his killing her. As a matter of law and Framing-era understandings, therefore, petitioner "intended" the inevitable consequence of his victim's death. *See State v. Romero*, 133 P.3d 842, 868 (N.M. 2006) (intent can be "inferred" in some cases where the logical result of defendant's actions is the victim's inability to testify), *affirmed on other grounds*, 141 N.M. 403, 156 P.3d 694 (N.M. 2007); *People v. Stechly*, 225 Ill. 2d 246, 266-267 (Ill. 2007) ("the total certainty that a murdered witness will be unavailable to testify could theoretically support presuming intent in the context of murder").[4]

Contrary to petitioner's claim (at 43-44), permitting application of forfeiture by wrongdoing without specific intent to tamper with a witness will not "cause an entire class of criminal defendants" to be denied confrontation rights. First, homicide defendants retain the right to confront all other

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[4] *Amici* do not, by this argument, intend to suggest that forfeiture applies only where defendant is aware that the victim spoke to police in the past. The foreseeability analysis applies to all wrongful killings–as all killers know their victims will be unavailable as a witness in a future trial.

witnesses; just not the one they killed. Second, courts must still determine by a preponderance of the evidence whether the defendant *wrongfully* killed the victim. Third, additional evidentiary protections protect against admission of unreliable or overly prejudicial statements. Moreover, where the witness is still alive, forfeiture's unavailability requirement will require specific evidence linking the defendant to the witness' absence. *See* Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 No. Car. L. Rev. 1, 41-46 (2006). Petitioner's approach, in contrast, by limiting the doctrine to cases showing a specific-intent to witness-tamper, would exclude "an entire class" of prosecutions from fair process by denying courts in future cases the opportunity to make such fact-specific findings regarding forfeiture.[5]

### B. The Equitable Maxim Underlying The Forfeiture Doctrine Denies Benefit to Wrongdoers Regardless of Intent.

Forfeiture by wrongdoing is "the outgrowth of a maxim based on principles of common honesty." *Reynolds*, 98 U.S. at 159. This equitable maxim—that no one should be allowed to take advantage of his or her own wrong—has deep roots in the common law. Nothing in the logic of the maxim or in Framing-era law confines it to cases where the litigation advantage gained by the wrongdoer or a third party was the specific motivation for the wrongdoing. Rather, common-law courts regularly

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[5] This Court has itself affirmed that forfeiture "for misconduct" needs no specific intent. *See Illinois v. Allen*, 397 U.S. 337, 339-443 (1970); Illinois, et al. *Amicus* Br. 8-10.

applied the maxim where other considerations motivated the wrongdoing.

The "wrongdoing" maxim goes back at least to 1725, when the court refused to entertain an action for accounting between two highwaymen. *See* Note, *The Highwayman's Case (Everet v. Williams)*, 35 L.Q. Rev. 197 (1893). Lord Mansfield later explained that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120, 1121 (K.B. 1775). Indeed, the "wrongdoing" maxim is but a particular application of the bedrock requirement of courts of equity that those seeking equitable relief must have "clean hands" with regard to the matter they seek to vindicate. *See, e.g., Barnes v. Starr*, 64 Conn. 136, 28 A. 980, 984 (1894) (discussing relationship of equitable maxims to "clean hands" principle).

The fundamental requirement of equity focuses on the voluntary, wrongful acts of the party and the connection between the wrongdoing and the legal question before the court, not on the specific intent of the wrongdoer. *See, e.g.*, Joseph Priestley, *An Essay on a Course of Liberal Education*, 132 (1765) ("Maxim the first. He that will have equity done to him must do it to the same person. 2d. He that hath committed iniquity shall not have equity."); Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional* Law 396 (1857) ("[A]n individual shall not be assisted by the law in enforcing a demand originating in a breach or violation on his part"). As this Court explained in *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897), "[a] court of equity acts only when and as conscience

commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of the them in a court of law, he will be held remediless in a court of equity." *See also* 1 Pomeroy's Equity Jurisprudence §397 (1st ed. 1881).

Of course, the "clean hands" maxim does not mean that a wrongdoer loses all legal rights. The maxim denies relief only "for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933) (citing 1 Pomeroy, *supra*, § 399; Story's Equity Jurisprudence (14th Ed.) § 100). To grant relief in those circumstances "would make this court the abetter of iniquity." *Id.* (quoting *Bein v. Heath*, 47 U.S. (How.) 228, 247 (1848)). Here, petitioner's killing of Ms. Avie, coupled with his effort to use her death as the basis for excluding her prior statements to police, was directly relevant to the principal question at trial—whether petitioner murdered Ms. Avie or shot her in self-defense. His conduct therefore fits squarely within the maxim, which "is a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief." 2 Pomeroy, *supra*, §397.

The "wrongdoing" maxim recognized in *Reynolds*, like the clean hands requirement on which it is based, was well established and respected by American courts of the Framing era. *Mitchell v.*

*Smith*, 1 Binn. 110, 1804 WL 966 (Pa. 1804) (dismissing suit to recover on note given for illegal transaction); *accord Bostick v. McLaren*, 2 Brev. 275, 1809 WL 294 (S.C. Constitutional Ct. App., 1809). Of particular importance here, the *principle applies in criminal cases as well as in civil cases. See Diaz v. United States*, 223 U.S. 442, 458 (1912) ("Neither in criminal nor civil cases will the law allow a person to take advantage of his own wrong.") (quoting *Falk v. United States*, 15 App. D.C. 446, 460 (D.C. App. Ct. 1899)); *see also Barnes v. Starr*, 28 A. 980, 984 (Conn. 1894) (collecting 19th century cases where relief was denied based on unclean hands due to party's wrongful conduct, "whether willful or not").

The same principle has been embodied in the "slayer rules" widely applied at common law in the insurance and inheritance contexts to preclude even innocent beneficiaries from recovering a wrongfully killed victim's assets. *See, e.g., Amicable Society v. Bolland*, 4 Bligh N.R. 194, 211 (House of Lords 1830) (where insured was executed for forgery, beneficiary's innocent assignees denied recovery even though the insured never "intended" to be hanged); *accord Burt v. Union Cent. Life Ins. Co.*, 187 U.S. 362 (1902) (refusing to allow the assignees of the husband's life insurance policy to recover after he was hanged for murdering his wife); *Box v. Lanier*, 79 S.W. 1042 (Tenn. 1904) (barring husband's heirs from recovering on insurance policy on husband's life, where husband murdered wife and then killed himself).

Similarly, in inheritance cases, "[i]t seems to be nearly universally accepted by the courts . . . that a slayer may be prevented from taking under the will

of his victim *without regard to whether he was actually motivated by the prospect of so benefiting from his act.*" Walsh, Annotation, "Homicide as Precluding Taking Under Will or by Intestacy," 25 A.L.R.4th 787, § 12 (emphasis added).[6] *See, e.g., Van Alstyne v. Tuffy*, 169 N.Y.S. 173, 174 (Sup.Ct. Monroe Cty 1918) (holding that equity barred the killer's intestate successors from profiting from "the natural and direct consequence of [the] criminal act . . . whether the crime was committed for that very purpose or with some other felonious design"); U.P.C. §2-803(f) (codifying slayer rule without any intent requirement).

That the equitable principle of "unclean hands" did in fact underlie Framing-era understandings of "forfeiture" is clear from contemporaneous definitions of the term: A highly regarded legal treatise of the day defined forfeiture as:

> [t]he omission or neglect of a duty, which the party binds himself to perform, or to the performance of which he is enjoined by the law, and is upon the breach or neglect thereof called a forfeiture, that is the advantages occurring from the performance of the thing are by this omission defeated and determined.

2 Matthew A. Bacon, *A New Abridgement of the Law* (London 3d. ed. Printed by His Majesty's lawprinters

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[6] Cases supporting this view — and some exceptions - are set forth at Walsh, *supra*, at §§ 3[b], 3 [c], 14[b], 14 [c]. A minority view is that forfeiture is precluded by statutes governing inheritance, absent any provision barring killers. Walsh, *supra*, §§ 2[a], 3[a], 14[a].

1768).[7] Similarly, Webster defined the term forfeiture as: "[t]he act of forfeiting; the losing of some right or privilege, estate, honor, office or effects, by an offence, crime, breach or condition or other act." 1 N. WEBSTER, *supra*,.

Petitioner argues that his right to confront the witnesses against him is not a "benefit" or "privilege" which can be forfeited pursuant to unclean hands. Pet. Br. 47-48. However, the fact that the confrontation right is a "bedrock principle" of the Constitution does not mean it cannot be forfeited by defendant's wrongful conduct. Indeed, if it is a "benefit" or "privilege" that can be forfeited for intentional witness-tampering, it is just as much a "benefit" or "privilege" when forfeited for other wrongful conduct which makes confrontation impossible. Certainly, the idea that a person may kill a victim and then object to her absence from his trial and claim rights flowing from his own wrongdoing, is "offensive to the dictates of natural justice." *Deweese*, 165 U.S. at 390.

### C. Framing-Era Cases Concerning Deceased Witnesses Have No Bearing On The Forfeiture Doctrine.

Petitioner's and NACDL's reliance on dying declaration cases in support of their specific-intent requirement is, at best, misguided. First, they do not cite a single case in which forfeiture by wrongdoing was addressed in conjunction with a dying declaration. Both *King v. Woodcock*, 168 Eng.

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[7] Like many early dictionaries this treatise did not have page numbers. All quotes are as stated in the original except archaic spelling has been replaced.

Rep. 352 (1789), and *King v. Dingler*, 168 Eng. Rep. 383 (1791) held that magistrates who took the victims' statements had failed to properly apply mandated procedures under the Marian statutes, including obtaining the defendant's presence at the deposition, even though those statutory procedures were well-established and capable of being followed. Forfeiture by wrongdoing is nowhere discussed. There is no comparable procedural violation in the case before the Court—thus *Woodcock*, *Dingler* and other *Marian*-statute cases are inapposite to the question here.[8]

In contrast, the early American case of *McDaniel v. State*, 8 Smedes & M. 401, 1847 WL 1763 (Miss. Err. & App. 1847), *does* analyze forfeiture, along with dying declarations. Here, the court, after finding the statements met the dying declaration standard, rejected the defendant's claim that admission of the evidence violated his Sixth Amendment right to confrontation, holding that "[i]t would be a perversion of [the Sixth Amendment's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death." *Id.* at *8. The court therefore rejected the confrontation claim based on the wrongdoing maxim.

That case highlights the core reason why dying declaration cases cannot answer the forfeiture question here: The requirements for dying

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[8] Indeed, even petitioner asserts that the Marian statutes, as distinct from the common law, are not the proper basis for deriving the original meaning of the Confrontation Clause. Pet. Br. 17.

declarations are less about confrontation than about evidentiary reliability/prejudice. *See* NACDL Br. 16. As a leading treatise explained, "[d]ying declarations have every element of dramatic evidence" and "possess an impressiveness out of all proportion to their evidentiary value" that, in turn, threatens to inflame "the elemental passions" of the court and jury. 1 Wharton, Evidence 529 (10th ed. 1912); *accord Commonwealth v. Mulferno*, 108 A. 639, 640 (Pa. 1919) ("the court and jury may sometimes have their better judgment overridden by the admission of such statements, having the effect of sweeping away their impartial attitude, and substituting for it the emotional element, as presented by the picture depicted by the dying man; and it is on this account courts have imposed a certain strictness on the admission of these declarations"). Because they were uniquely capable of distorting factfinding, such statements had to satisfy strict reliability/prejudice-based conditions to be admitted. This analysis was principally a reliability, evidentiary inquiry—it was not an inquiry into forfeiture or confrontation per se.

Thus, where courts *rejected* dying declarations as failing to meet the special reliability/prejudice requirements, there was no need to reach the confrontation/forfeiture question. Where such statements were *admitted*, there also has no need to address forfeiture. Either way, dying declaration determinations provide no support for petitioner's construction of the forfeiture-by-wrongdoing doctrine.

Finally, even if these cases were seen as indicative of the scope of forfeiture by wrongdoing, at most they would indicate only that Framing-era courts did not address forfeiture by wrongdoing

outside of the witness-tampering context. Given the dramatic differences between modern adjudications of domestic violence and domestic homicide and the types of adjudications dealt with by Framing-era courts, *cf.* Section I.D., *infra,* it is unsurprising that they did not face the questions of *pre*-charge interference with witnesses raised by domestic violence and homicide cases of today. The absence of such applications at that time thus tells us little about what they would have thought about forfeiture in the context we confront today.

The differences between then and now are particularly salient given the equitable nature of the forfeiture by wrongdoing doctrine. Unlike specified constitutional rights, equitable doctrines such as the "wrongdoing" maxim are inherently based in community norms. Equity, which embodies the concept of "fairness," is intrinsically bound up with society's sense of right and wrong. As society's values and norms change over time, so must notions of "equity." *See, e.g., Union Pacific R. Co. v. Chicago, R.I. & P.R. Co.*, 163 U.S. 564, 601 (1896) (Equity "has always preserved the elements of flexibility and expansiveness . . . in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." (citing 1 Pomeroy, *supra*, § 111); 1 Pomeroy, *supra*, § 67 (The "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs. . . . [I]t possesses an inherent capacity of

expansion, so as to keep abreast of each succeeding generation and age.").[9]

Thus, to the extent that in certain dying declaration (or other cases) past courts undoubtedly ruled without consideration of modern equitable concerns, such decisions should not dictate the contours of the modern application of equitable forfeiture by wrongdoing. As is addressed below, modern concerns not shared in the Framers' era include: the disturbing rates of domestic violence and domestic murder today; the prevalence of defendants keeping witnesses away through *pre-*

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[9] In *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund*, this Court declined to accept a construction of the Judiciary Act of 1789's conferral of federal court jurisdiction over "all suits . . . in equity" to include "a type of relief that ha[d] been specifically disclaimed by longstanding precedent." 527 U.S. 308, 318-19, 22 (1999). This Court held that Congress could not have intended to grant federal courts such power in the Judiciary Act. In so holding, however, the Court made clear that it "[did] not question that equity is flexible." *Id.* at 322. Similarly, in *Great Western Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002), the Court adopted a narrow construction of ERISA Section 502(a)(3), precluding money damages, in light of historical evidence that such damages historically had been considered "legal" rather than "equitable" relief. In both cases, the Court was driven by concerns over the proper limits of federal court jurisdiction. *See Stonebridge Invest. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 772 (2008) (reaffirming that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation") (citation omitted). Such jurisprudential and political concerns are entirely absent here, where concerns over the limited jurisdiction of federal courts are not implicated and the existence of both the equitable "wrongdoing" maxim and the use of forfeiture to vindicate the maxim are settled features of equity jurisprudence.

charge wrongdoing, including domestic murders; the understanding that domestic murders typically occur only after a long history of domestic abuse, prior reports to police, and potential prosecution; and the fact that understanding the past abuse is often essential to discerning the truth about the final killing. These realities must be part of a determination of what "equity" demands.

### D. The Problem of Domestic Murders In The Context Of A History Of Battering Was Simply Not An Issue For Framing-Era Courts And Framers.

At root, the debate in this case is whether the traditional paradigm of "witness-tampering," which dominated Framing-era courts' consideration of forfeiture by wrongdoing, should define the outer limits of the doctrine – or whether the doctrine may also be applied to a new type of problem not considered or addressed by the Framers.[10] This

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[10] Petitioner's reliance on Federal forfeiture Rule 804(b)(6), which does require specific intent, is subject to the same response. Pet. Br. 34-40. The Advisory Committee, headed by Judge Ralph Winter, author of *United States v. Mastrangelos*, 693 F.2d 269 (2d Cir. 1982), a mob-related witness-tampering case, was focused solely on witness-tampering when determining the scope of the new Rule. Insofar as federal courts rarely adjudicate domestic violence or domestic murders, they, like Framing-era courts, have had no occasion to confront the problem which dominates the nation's state criminal court dockets–whether *pre-charge* intimidation, control and criminal conduct which causes the witness' absence or explains the witness' murder, should constitute grounds for forfeiture by wrongdoing. Furthermore, in any event, the Federal Rule does not define the scope of the constitutional doctrine. *Crawford*, 541 U.S. at 50-51, 61.

Court is regularly required to apply original meaning to modern problems. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (acknowledging that the "advance of technology" inevitably affects the privacy secured to citizens by the Fourth Amendment); *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (applying Sixth Amendment to uphold rape shield statute). As explained below, confrontation rights in domestic violence cases and domestic homicides—as we now understand them—are a modern problem not faced by Framing-era courts or lawmakers.

In the 1700's and 1800's, domestic violence had ambiguous legal status in England and America. To some extent the use of force against wife and children was considered a man's obligation. "By law, a husband acquired rights to his wife's person . . . A wife was obliged to obey and serve her husband . . . As master of the household [he] could command [her] obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority." Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117, 2122-23 (1996) (citing cases); 1 William Blackstone, *Commentaries on the Laws of England* 430 (1765) (describing the doctrine of "coverture" whereby women lost legal existence upon marriage).

Legal remedies for wife-beating existed only to a limited degree. Blackstone suggested that the "moderate chastisement" which the "old law" had prescribed was in flux in the "politer reign of Charles the Second." *Id.* at 433 ("with us . . . this power of correction began to be doubted: and a wife may now have security of the peace against her husband . . ."). In the colonies, some Puritan-

leaning states adopted laws against wife-beating and others incorporated English common law remedies such as the "peace bond." Ruth Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, Early American Studies, Vol. 5, No. 2, Fall 2007, 223-251, 232. Such proceedings were "summary" proceedings "without the need for a trial or jury, in petty sessions." Elizabeth Foyster, MARITAL VIOLENCE: AN ENGLISH FAMILY HISTORY 1660-1857, 16, 21-24 (Cambridge Univ. Press, 2005); Bloch, *supra*, at 234. The dominant goal of these proceedings was reconciliation and future safety, not punishment. Foyster, *supra*, at 16, 21-22. Constitutional protections thus were not at issue. *Id.* at 25 ("witnesses were only occasionally examined"); J.F.S., *Peace and Behavior Bonds*, 52 Va. L. Rev. (Jun. 1966), 914-933, 927-28 (as late as the 1960's many states provided peace bond proceedings without constitutional protections).[11]

Legal responses to wife-beating became even less available to women after the Revolution. Bloch, *supra*, at 248 ("the Revolution if anything reinforced

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[11] The courts offered uncertain and limited protection, reflecting the society's acceptance of some amount of wife-beating. Foyster at 21 (husband claimed wife "mad" and no bond issued); A Gentleman of the Law, *The Conductor Generalis: or, The Office, Duty and Authority of Justices of the Peace*, 335 (Philadelphia: 1801) (noting that some continued assaults "even [by] a husband [against] his wife, as some say," may not result in forfeiture of the bond); *Bradley v. State*, 1 Miss. (1 Walker) 156, 1824 WL 631, at *1 (1824) (permitting "moderate chastisement" of wives); *State v. Black*, 60 N.C. 262, 1864 WL 1041, at *1 (1864) (approving use of force "to control [a wife's] unruly temper").

the baseline of male coercive control over women"). Greater emphasis on family privacy, and lesser authority to the State, meant that the "older justifications for holding male heads of families accountable to governmental authority eroded in the early republic, and American law moved toward the recognition of a new, institutional right to familial privacy that accorded fewer legal protections to household dependents like abused wives." *Id.* at 250. *See State v. Rhodes*, 61 N.C. 453 (N.C.1868) (adopting family privacy rationale for refusing to allow prosecution of "trifling violence" between spouses).

Thus, at the time of the Framing, wife-beating was rarely adjudicated, and was dealt with primarily, if at all, through informal mechanisms lacking criminal penalties or constitutional protections. Wife-beating was scarcely recognized as a problem. In March 1776, Abigail Adams wrote her famous letter to her husband who was then at the second Continental Congress preparing to declare America's independence. She urged that "the new code of laws" end husbands' "unlimited power" over wives, asking "[w]hy not put it out of the power of the vicious and the lawless to use us with cruelty and indignity with impunity?" John Adams's response is emblematic of the views of his time that wife-beating was a trivial problem of no legal or constitutional significance: "As to your extraordinary code of laws, I cannot but laugh . . . . Depend upon it, we know better than to repeal our masculine systems. . . [we must avoid] the despotism of the petticoat . . . ." MY DEAREST FRIEND: LETTERS OF ABIGAIL AND JOHN ADAMS 110-111, 112, 116 (Margaret A. Hogan & C. James Taylor, eds., 2007).

The fact that wife-beating was barely legally cognizable and deemed insignificant at the time of the Framing has several important implications. First, it means that when killings of wives occurred, there were unlikely to be prior complaints or investigatory records establishing a pattern of assaults or threats, because such abuse had minimal legal significance and was rarely documented by authorities.[12] Thus, the kinds of witness statements and investigatory reports at issue here would not have existed in Framing-era domestic homicide cases. Indeed, even if the victim had told someone privately of her husband's violence, prosecutors in that era would have been much less likely to even *look* for past hearsay, lacking the perspective we now have on the links between ongoing domestic violence and ultimate domestic murder.[13] Framing-era courts and legal thinkers would not have considered, for example, whether an accused murdered his wife to *retaliate* for her reporting his

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[12] Foyster, *supra* at 26 ("Much of the important work that magistrates conducted informally in petty sessions and in the police courts ... rather than legal proceedings, was not minuted [*i.e.*, documented].").

[13] Understanding of the link between murder and domestic violence has only recently emerged in this country as well, largely as a result of the O.J. Simpson case. Prior to that time, it is *Amici*'s experience that many people thought that "domestic violence" did not involve "murder" and that the two problems were entirely distinct. *See* Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2(1) So. Calif. Rev. of L. & Women's Studies 71 (1992); Lynnell Hancock, *Why Batterers So Often Go Free*, Newsweek (October 11, 2005)("Prosecutors need to do a better job of making this gruesome link between murder and abuse very clear for jurors, say legal experts").

battering, a current and realistic scenario close to the "witness tampering" paradigm but not involving a specific-intent to "prevent" the witness's in-court testimony. In short, the post-charge, witness-tampering paradigm does not describe why most battered women - whether dead or alive - are absent from trial. Yet the accused's role in such witnesses' absence is equally critical and equally (or more) wrongful than in a witness-tampering case.

Second, the fact that domestic violence was generally not treated as a serious crime or even recognized as a significant legal problem in the Framing era means that courts and commentators had little or no need to apply the forfeiture principle outside of the traditional witness-tampering paradigm. But this Court has recognized that the Confrontation Clause (like all constitutional provisions) cannot be limited to the precise factual scenarios that existed in the Framing era. *See Davis*, 547 U.S. at 830 n.5 ("Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.").

Modern realities could not be more different: All states now criminalize domestic violence. Many have adopted mandatory arrest statutes. Proactive and aggressive prosecution of battering has become the norm, strongly encouraged by federal and state governments.[14] Prosecutions of domestic violence,

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[14] *See generally* Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wisc. L. Rev. (6), 1657, 1670, 1672 (twenty-one states and the District of Columbia had adopted mandatory arrest as of June 2003; also discussing "aggressive prosecution policies")

child abuse, and domestic homicide cases are characterized by absent witnesses, because abuse victims are intimidated, terrorized or ambivalent. *See generally,* James Ptacek, BATTERED WOMEN IN THE COURTROOM 145-46 (1999) (detailing victims' fears of retaliation); Tom Lininger, *Prosecuting Batterers After Crawford,* 91 VA. L. R. 747, 768, 769 (2005) (in one study half of all victims suffered threats of retaliation). In this context, the problem of absent witnesses derives not solely from post-charge "witness tampering" by the defendant, but very often from *pre*-charge abuse, coercion, intimidation, or at worst, killing by the defendant. *See generally* Tuerkheimer, *supra.* Thus, while reliance on the types of cases adjudicated in the Framing-era provides some guidance, it cannot fully resolve the question of the proper application of the original meaning of the Confrontation Clause to the modern problems of domestic violence and domestic murders.

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(citations omitted); Jeffrey Fagan, *The Criminalization of Domesic Violence: Promises and Limits,* NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT (JAN. 1996), p. 1 ("[d]uring the past 30 years, the criminalization of domestic violence has developed along three ... tracks: criminal punishment and deterrence of batterers, batterer treatment, and restraining orders designed to protect victims through the threat of civil or criminal legal sanctions"); Violence Against Women Office Press Release, "Justice Department Funds Community Initiatives to Treat Domestic Violence as a Crime," (1998), available at http://www.ojp.usdojgov/pressreleases/1998/VAW98204.htm; International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy on Domestic Violence* (1996 & 1997) (urging equal treatment of domestic assaults and calling for non-arrest decisions to be justified).

However, if we seek to draw "reasonable inferences," *Crawford*, 541 U.S. at 52, n. 3, as to how the Framers would have applied this doctrine to the modern problem, there is one piece of significant historical evidence that suggests that Framing-era courts, had they faced the domestic violence/homicide dockets of today, would have recognized the applicability of forfeiture to cases such as these. That evidence concerns the courts' and commentators' treatment of cases involving sexually assaulted children. In such cases, pre-Framing-era British courts routinely admitted hearsay from those to whom the children reported, when the children were legally prohibited from testifying under oath. *See generally* Tom Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L. J. 1029, 1035-1044 (2007) (surveying practice of admitting children's hearsay in child rape cases, primarily in the 1700's). Sir Matthew Hale's famous Treatise asserted that child rape victims' unsworn testimony should be admitted, since it was preferable to the hearsay reports of their statements which were *already admissible*, and their information was the only possible proof of the crime. 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 634 (London, Prof'l Books Ltd. 1971) (1736). *See, e.g., Rex v. Robbins*, Old Bailey Session Papers (hereafter "OBSP") (Jan 13, 1721) (mother testified as to daughter's descriptions of the rape); *Rank v. Tankling*, OBSP (Jul 11, 1750) (doctor testified regarding child's description of the rape); *Rex v. Larkin*, OBSP (July 3, 1751) (aunt and an additional witness testified as to child's descriptions of the rape).

This reality is directly contrary to petitioner's absolutist position that Framing-era defendants could never be convicted without the right to cross-examine the accuser. And it suggests that in cases concerning a heinous crime occurring behind closed doors, Framing-era courts and leading thinkers recognized that hearsay from such witnesses—who could not be sworn and give testimony—was admissible as the only viable means of proving the crime. *Lyon & LaMagna, supra,* at 1035-1036 ("Hale, Bathurst and Blackstone thus took a 'best evidence' approach to the receipt of children's statements"); 4 William Blackstone, *supra,* at 214 (1769) (referencing Hale's argument that such information ought to be heard, "because the nature of the offence being secret, there may be no other possible proof of the actual fact" but arguing that corroboration was still necessary). These courts' and commentators' recognition of the necessity to admit hearsay in such cases would be applicable to the problems of domestic murder prosecutions today, which also involve a crime committed behind closed doors, and of which, very often, "no other testimony can be had of the very doing . . . but the party upon whom it is committed . . . ." 1 HALE, *supra,* at 634.

## II. PETITIONER'S SPECIFIC-INTENT REQUIREMENT WOULD CRIPPLE THE TRUTH-SEEKING PURPOSE AND INTEGRITY OF ADJUDICATIONS AND CREATE AN INCENTIVE FOR BATTERERS TO KILL THEIR VICTIMS.

This Court has repeatedly held that the truth-seeking purpose and integrity of the judicial system are core considerations in applications of 6th

Amendment rights such as confrontation. These values are particularly weighty here, where the forfeiture doctrine must be applied "equitably."

As this Court has explained, "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) (citation omitted). Furthermore, "'one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 413 (citing *United States v. Nobles*, 422 U.S. 225, 241 (1975)). Accordingly, "presentation of reliable evidence and the rejection of unreliable evidence . . . and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* at 414-15.

In *Taylor*, this Court affirmed *exclusion* of a defense witness' testimony as a sanction for a discovery violation which undermined the prosecution's ability to cross-examine the defense witness. In domestic homicides, the potential for the justice process to pursue the truth is critically dependent upon the *admission* of past statements of the dead victim such as those in this case. Here the defendant claimed self-defense, and testified that the victim had threatened to kill him and others, and had approached him aggressively. J.A. 34. By contrast, the victim had previously told the police of a prior assault, stating while crying that the defendant had choked her, threatened her with a knife and threatened to kill her. *Id.* at 35-36. These statements are inextricably connected to any jury's

assessment of defendant's self-defense claim. Excluding Avie's past statements to protect Giles' confrontation right would thus be tantamount to treating that right as mandating a trial process which proceeds solely on "half-truth." *Taylor, supra,* at 413. This destruction of the integrity of the criminal trial process cannot be mandated by the Sixth Amendment.

The incompatibility of exclusion of such past statements with a "truth-seeking" or fair adjudication is epitomized in *State v. Romero,* 141 N.M. 403, 156 P.3d 694 (N.M. 2007), cert. dismissed, 128 S.Ct. 976 (Jan. 11, 2008). Defendant was on trial for murdering his estranged wife. He testified that when he woke up his estranged wife was dead in his bed, after a night in which they had fought, then "made up and had consensual sex," and then "fought some more." *State v. Romero,* 139 N.M. 386, 400, 133 P.3d 842, 855 (2006). He claimed that the victim had grabbed him in the genitals, punched him in the face and elbowed him in the mouth; that he bit her and struck her on the side of the head to get her to loose her grip; that they then went to sleep; and that when he woke up the victim was not breathing. *Id.*

In fact, defendant's version of events is ludicrous in light of his history of terrorizing the victim. In prior testimony before the grand jury, the victim had detailed the facts that the parties were separated and Defendant wanted her back, that he told her while choking her that "if he couldn't have [her] . . . nobody could," that she may have passed out, that after her roommate called the police, the defendant forced the victim into the bathroom with a knife to her abdomen and told her to tell everyone that the

marks on her neck were a result of "rough sex." 133 P.3d at 846-847. The victim also told a police officer and Sexual Assault Nurse Examiner that the defendant raped her in connection with these events, and said he would kill her. *Id.*

The trial court excluded the victim's statements, and the New Mexico Supreme Court affirmed (subject to a remand) and held that intent to procure the witness's unavailability must be proven before a defendant's right to confront the witness could be forfeited. 141 N.M. at 412. To paraphrase this Court in *Keystone*, such an inequitable result, allowing the defendant's outrageous version of the truth without admitting the victim's past testimony and statements demonstrating its falsity, makes the justice system "the abetter of iniquity." 290 U.S. at 245.

Cases like these—in which past statements by the victim are critical to a prosecution for murder—are tragically common.[15] Almost two-thirds of women

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[15] *See, e.g., State v. Sanchez*, 341 Mont. 240,177-P.3d 444 (Mont. 2008) (homicide conviction after statements admitted); *State v. Throm*, 695 N.W.2d 904 (Ct. App. Wis. 2005), pet. for review denied, 303 Wis.2d 743 (Ct. App. Wisc. 2007) (statements admitted; defendant convicted of intentional homicide after defense of intoxication); *People v. Romero*, 149 Cal. App. 4th (2007) (defendant acquitted of murder, convicted of manslaughter after statements admitted)); *People v. Bauder*, 269 Mich. App. 174, 712 N.W.2d 506 (2005), *lv. den.* 476 Mich. 863 (Aug. 29, 2006) (girlfriend killed by baseball bat and sexual assault with bat; defendant claimed he "snapped"; convicted of felony murder); *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005) (statements admitted and first degree murder conviction); *People v. Pantoja*, 122 Cal. App. 4th 1 (2004) (first-degree murder conviction thrown out; 2d degree murder conviction after past statement excluded).

murdered are killed by their intimates. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005), http://www.vpc.org/studies/wmmw2005.pdf (92% of female victims were murdered by someone they knew; 62% of these were killed by husbands or intimate *partners*). These femicides typically culminate a long history of domestic abuse aimed at dominating and silencing the victim. Jacquelyn C. Campbell, ed., ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS (2007); G.W. Wilt, *et al.*, *Domestic Violence and the Police: Studies in Detroit and Kansas City,* (Police Foundation 1976) (police had intervened at least once in the previous two years in 85% of spousal homicides). Batterers commonly threaten their victims never to report their abuse. Ptacek, *supra*, at 145-46. The chance of murder is at its peak upon separation.[16] Prior contact with the police is common.[17] And the abuse is frequently hidden from friends and neighbors, making prior statements to police officers sometimes the only evidence of the prior abuse.[18]

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[16] American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996) at 39; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 Mich. L. Rev. 1 (1991).

[17] *Domestic Violence and the Police, supra*; Friedman and McCormack, *Dial-In Testimony*, 150 U.Pa.L.Rev. 1171, 1196 (2002).

[18] *See, e.g.*, cases cited at n.16, *supra*. Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 W.St.U.L.Rev. 173, 181 (2007) ("It is undisputable that the overwhelming number of encounters between

While constitutional protections for defendants are essential, "justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *overruled on other grounds* by *Malloy v. Hogan*, 378 U.S. 1 (1964). This Court has upheld a confrontation restriction specifically aimed at protecting fairness in light of contemporary understandings of violence against women and the criminal process. *Lucas*, 500 U.S. at 149 (upholding preclusion of cross-examination of victim's sexual history under rape shield statute because "the right to present relevant testimony is not without limitation"). While recognizing that the statute diminished the defendant's ability to confront adverse witnesses and present a defense, the Court held that "[t]he Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system.'" *Id.* at 149 (noting "'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant'") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *Accord Taylor, supra*, at 412-415 (emphasizing the "integrity of the judicial system . . . of the adversary process . . . and the interest in the fair and efficient administration of justice"); *United States v. Nobles*, 422 U.S. 225, 234,

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husbands and wives [or cohabitants] take place in the home.") (citations omitted).

241 (1975) (preclusion of defendant's expert investigator's report where defendant failed to produce for prosecutor's cross-examination does not violate Sixth Amendment); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (the right to present testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In homicide prosecutions, excluding the only likely truthful version of the killing because it cannot be proven that the defendant killed with the specific intent to distort the justice process will itself profoundly distort the justice process by sacrificing any possible fairness or truth while allowing accused murders to control that process.

Lastly, a specific-intent requirement as a predicate for forfeiture threatens the safety of still-living domestic violence victims because it will encourage their batterers to kill them. Abusers pay close attention to legal processes and outcomes. Lynnell Hancock, *Why Batterers So Often Go Free*, Newsweek (October 16, 1995) (after Simpson acquittal, batterers told victims things like "I'm going to O.J. you"). Batterers are often intelligent and calculating experts at manipulating the legal system.[19] It will not take long for them to learn that no evidence of the victim's past statements to police

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[19] Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA Women's L.J. 173, 179-80 (1997); Sack, *supra*, at 1682 (batterers make false accusations to manipulate the justice system against their victim); *Chieco v. Chieco*, 170 A.D.2d 569, 566 N.Y.S.2d 345 (App. Div. 1991) (reversing protection order issued to husband because he was using it solely to intimidate his wife who was seeking divorce based on cruelty).

can get before the jury if the victim is dead—so long as it cannot be demonstrated that they killed the victim for this purpose. Given the obvious other motives and contexts for killings by batterers, victims' incriminating past hearsay will be virtually guaranteed to be excluded in murder prosecutions, while in a mere battering prosecution it will still be possible for the victim to testify or for tampering conduct to be proven so as to admit past hearsay. Abusers will thus know that if they kill their victim their risk of conviction will be significantly lower than if they merely beat her. *See, e.g.*, Lininger, 91 Va. L. Rev. at 772 (when batterers know that live testimony is required they increase the coercion of the victim to not testify). It is inconceivable that the Constitution requires the creation of an incentive to kill, and certainly no principle grounded in equity could do so.

## CONCLUSION

For all the foregoing reasons, *Amici* DV Leap et al. urge this Court to affirm the decision below.

Respectfully submitted,

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March 26, 2008

# APPENDIX A

## INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondent, and urge the Court to affirm the decision of the Supreme Court of California.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP's mission is to enforce battered women's and their children's constitutional and legal rights and to promote fairness for victims and defendants by providing expert representation to appeal unjust trial court decisions. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law in deciding domestic violence cases, and has previously co-authored two other amicus briefs to the United States Supreme Court: *Castle Rock v. Gonzalez* and *Davis v. Washington, Hammon v. Indiana.* In *Davis* DV LEAP's brief specifically addressed forfeiture by wrongdoing. DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized statewide domestic violence coalition for California. Its members include approximately one hundred domestic violence service organizations, supportive organizations, survivors of domestic

violence, and other concerned individuals. CPEDV was formed in 2005 out of a merger of two former entities, the California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW). CPEDV works to end domestic violence through public education, partnerships, advocacy, public policy, and direct services and is member driven. CPEDV authored the domestic violence amicus brief in support of the People of California that was submitted to the Supreme Court of California in this case.

**Legal Momentum** advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to working to end violence against women. Legal Momentum was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum previously co-authored an *amicus curiae* brief in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), which highlighted the issue of forfeiture by wrongdoing.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization incorporated in the District of Columbia in 1986. The mission of DCCADV is two fold: (1) to eradicate all types of relationship violence including: domestic violence, spousal rape, sexual assault, stalking, mental and emotional abuse, and

acquaintance rape through the coordinated mobilization of efforts to effect systemic social change; and (2) to build a city wide response in the District and surrounding jurisdictions in partnership with the community, providers, and concerned others to more effectively ensure the safety and security and justice needs of those living with violence and abuse. DCCADV pursues these goals through its focus on advocacy, public education, public policy, technical assistance, training, resources, research and direct services. DCCADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. DCCADV works with the community to implement best practices in the prosecution of domestic violence cases. DCCADV provides training for law enforcement officers and prosecutors about domestic violence and the needs of victims. DCCADV has been involved in the reform of local laws addressing domestic violence for more than a decade. Along with governmental agencies and not-for-profit direct service providers in domestic violence and criminal justice issues, DCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

The **Michigan Domestic Violence Prevention and Treatment Board (MDVPTB)** is a 7-member, Governor-appointed Board established by the Michigan Legislature in 1978 (Act 389 of 1978). The MDVPTB is administratively housed within the Michigan Department of Human Services, and served by an Executive Director and staff members who assist it in fulfilling its responsibility to focus state activity on domestic

violence and sexual assault. The MDVPTB's statutory charge includes: (1) studying and recommending changes in civil and criminal procedures which will enable victims of domestic violence to receive equitable and fair treatment under the law, and (2) advising the Legislature and Governor on the nature, magnitude, and priorities of the problem of domestic violence and the needs of victims of domestic violence. The MDVPTB also administers funding for private, nonprofit agencies serving victims of domestic and sexual violence across the state of Michigan. Past and present MDVPTB members represent a cross-section of professions that assist victims of domestic and sexual violence, including judges, prosecutors, law enforcement officers, domestic violence advocates, and social work and health care professionals.

The MDVPTB bases much of its work on a core belief that an effective response to domestic violence requires strong, swift criminal justice intervention to hold perpetrators accountable for crimes against their intimate partners. An evidence rule that conditions admissibility of a homicide victim's statement on proof that the killer intended to procure the victim's absence at trial is antithetical to justice system efforts to impose appropriate consequences for the ultimate domestic violence crime, because it offers homicide perpetrators an advantage at trial at the expense of their victims. Such a rule impedes the court in its search for truth in a way that is likely to encourage domestic homicides, given the complexities of intimate partner violence and the difficulty of proving that a killing in this context was done with the specific intent to procure the victim's silence at trial.

**D. Kelly Weisberg**, is a family law professor at Hastings College of the Law. She has taught in the fields of Family Law and Children and the Law for 25 years at several law faculties (Hastings, Washington University, University of San Francisco, and Boston University). She has authored leading casebooks on Family Law and Children and the Law. Ms. Weisberg's Family Law casebook addresses many aspects of domestic violence, including: battered woman syndrome, the duties of law enforcement, marital rape, tort remedies, evidentiary privileges arising from the marital relationship, and discrimination (housing, employment) against survivors.

# AMICUS CURIAE BRIEF

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3-26-08

No. 07-6053

In The

# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of California**

**BRIEF OF RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law. Much of my academic work has dealt with the confrontation right. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). I have a particular interest in forfeiture doctrine, because I believe a robust conception of the confrontation right cannot be developed without a robust conception of how the right might be forfeited. Among my writings on forfeiture are *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997) [hereinafter "*Chutzpa*"], and *Forfeiture of Confrontation Rights After* Crawford *and* Davis, 19 REGENT U.L. REV. 489 (2006-07) [hereinafter "*Forfeiture of Confrontation Rights*"]; in addition, I have made several postings on forfeiture on the Confrontation Blog, http://confrontationright.blogspot.com, which I have maintained since 2004 to report and comment on developments related to the confrontation right. As I have done in several other cases, in this Court and in others, I am submitting an *amicus* brief on behalf of myself only; I have not asked any other person or entity to join it. I am doing this so that I can express my own thoughts, entirely in my own voice.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief.

I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this case, I submitted an *amicus* brief in support the petition for *certiorari*, brought by a criminal defendant, because I believe that this is an ideal case for the Court to begin development of the doctrine of forfeiture of the confrontation right – but my views on the merits of the question presented are far more in line with those of the prosecution, and so I am submitting this brief on the merits in support of the respondent. In one respect, however, not directly involved in this case but important in constructing and understanding an optimal theoretical framework for resolving it, my views are contrary to those of prosecutors: I believe that even though the accused presumptively forfeits the confrontation right if by his wrongdoing he renders a witness unavailable to testify at trial, the prosecution cannot invoke forfeiture doctrine if it forgoes reasonable opportunities to preserve part or all of the confrontation right.

## SUMMARY OF ARGUMENT

In this case, petitioner contends that his rights under the Confrontation Clause of the Sixth Amendment preclude admission against him of a testimonial statement made by the woman he killed, even assuming for purposes of this question that he killed her without justification. Petitioner contends for an absolute rule that an accused cannot forfeit confrontation rights unless he engages in wrongful conduct *for the purpose* of rendering the witness unavailable. By contrast, *amicus* contends that if an accused engages in serious misconduct that has the foreseeable consequence of rendering a witness unavailable to be a witness subject to confrontation, the accused should be deemed to have forfeited the confrontation right. Three basic reasons support this principle, rather than the strict purpose requirement advocated by petitioner.

First, the "essentially equitable" nature of forfeiture doctrine, *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Davis v. Washington*, 547 U.S. 813, 833 (2006), is incompatible with petitioner's argument. If an accused engages in serious misconduct that has the foreseeable consequence of rendering a witness unavailable subject to confrontation, then equitable considerations demand that the accused forfeit the right to object to introduction of the witness's statement on the ground that he has not had an opportunity to cross-examine her. He cannot be heard to complain about the foreseeable consequences of his own misconduct. In this case, there is no need to apply this basic principle any further than to the core case of forfeiting misconduct: murder. Later cases can deter-

mine the outer bounds of the principle – including the responsibility of the prosecution, if it wishes to invoke forfeiture doctrine, to act reasonably to preserve the confrontation right to the extent reasonably practicable.

Second, limiting forfeiture doctrine in the way that petitioner contends would require the addition of a bizarre and ill-fitting complexity to the straightforward structure of confrontation law enunciated by *Crawford*. It is common ground that the Confrontation Clause does not require exclusion of most statements fitting within the traditional "dying declaration" exception to the rule against hearsay, but the question is why. Because the narrow forfeiture rule advocated by petitioner does not reach most of these statements, petitioner is forced to contend that the Confrontation Clause itself contains an unexpressed "dying declaration" exception. The rationale for such an exception makes little sense on its own terms, and its reliability-based nature flies squarely in the face of *Crawford*. A much simpler, more persuasive explanation for admitting these statements, one that fits *Crawford* far better – and so will tend to preserve the robustness of the confrontation right – is that if the accused murders a witness and the state has no reasonable opportunity to arrange for a confrontation between the two, the accused should be deemed to have forfeited the confrontation right.

Finally, the principle advocated by *amicus* is in accordance with the actual holdings of framing-era criminal courts. Notwithstanding their rhetoric, those courts did not create a general rule admitting statements in criminal cases made while the declarant believed himself on the verge of death. Rather, they

admitted statements made by dying *victims of homicides* – and then only if either (a) the accused had an opportunity to be confronted with the speaker, or (b) the speaker believed himself to be on the verge of death. These results square well with a doctrine under which an accused who murders a witness forfeits the right to demand confrontation with the witness so long as the state has acted reasonably to preserve the right to the extent feasible; the victim's belief in the imminence of her own death was a reasonable factor to use in effectively marking when the state may invoke forfeiture theory without arranging for a confrontation between a murderer and his victim.

## ARGUMENT

### I. EQUITABLE CONSIDERATIONS PRECLUDE A RULE UNDER WHICH AN ACCUSED WHO MURDERS A WITNESS COULD FORFEIT THE CONFRONTATION RIGHT ONLY IF A MOTIVATING PURPOSE WAS TO RENDER THE WITNESS UNAVAILABLE TO TESTIFY.

The petitioner killed Brenda Avie and objects on Confrontation Clause grounds to admission of a testimonial statement she made after an earlier incident several weeks beforehand. He contends that, even assuming for purposes of the evidentiary question that he murdered Avie, he cannot be held to have forfeited the confrontation right unless he murdered her *for the purpose* of rendering her unavailable to testify as a witness. If the contention appears at first glance to be counter-intuitive, close analysis does not give it any greater appeal.

As the Court stated in *Crawford v. Washington*, 541

U.S. 36, 62 (2004), and repeated in *Davis v. Washington*, 547 U.S. 813, 833 (2006), the doctrine that an accused may forfeit the confrontation right by wrongdoing that renders the witness unavailable to testify is "essentially equitable" in nature. In *Reynolds v. United States*, 98 U.S. 145 (1879), this Court's first case involving forfeiture of the confrontation right, it succinctly expressed the equitable underpinnings of the doctrine: "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Id.* at 158.

This case features three factors that make it an easy case for application of this principle:

(1) The accused has engaged in *serious misconduct* against the witness.[2] Indeed, the wrongdoing here –

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[2] The California Supreme Court concluded that there was clear and convincing evidence that the petitioner committed a criminal homicide against the witness. Jt. App. at 64. Petitioner does not appear to contend that a constitutional problem is created by the fact that this issue – whether he committed a criminal homicide – arises in determining both (1) whether he forfeited the confrontation right, and (2) whether he is guilty on the merits. And indeed, there is no genuine concern about "bootstrapping" or circularity. The trial judge, in determining forfeiture, and the jury, in determining guilt on the merits, have different functions to perform. They do so on different bodies of evidence, under different standards of persuasion, and with different consequences. The fact that in some settings the same factual question is before them poses no logical or practical difficulty; the judge does not announce to the jury her decision on the predicate matter. The setting is closely analogous to a prosecution for conspiracy in which the admissibility of a key statement depends on a determination by the court that the accused engaged with the declarant in the very conspiracy charged. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 175 (1987). *Amicus* has made an extended argument on this point in *Chutzpa*, *supra*, 31 ISRAEL L. REV. at 521-24.

murder – is the most grievous act one person can commit against another.

(2) The misconduct *clearly rendered the witness unavailable to testify*. That is, there is no doubt either that the witness could not appear to testify at trial – or at any other proceeding after the fatal incident – or that the reason for her inability is that the accused killed her. Thus, the state had no opportunity to mitigate the problem by arranging for a confrontation at any time after that incident.

(3) The witness's unavailability was the *foreseeable, natural consequence* of the wrongdoing. From the instant the petitioner cast the fatal blows against Avie, it appeared highly likely that the effect would be that Avie would not be able to testify.[3]

It would be abhorrent to prevent the jury from hearing Avie's testimonial statement on the ground that the petitioner did not have an opportunity to cross-examine her. He did not have that opportunity because he *murdered* her. That he did not do so *for the purpose* of rendering her unavailable as a witness is of minimal significance.[4] If he considered the predictable

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[3] People v. Stechly, 225 Ill.2d 246, 287-88, 870 N.E.2d 333, 352-53 (Il. 20007), while generally insisting on a purpose requirement for forfeiture, attempts to distinguish murder cases on the ground that in a murder case "more than a possibility, or a substantial likelihood, a defendant knows with absolute certainty that a murder victim will not be available to testify." That is not true, however. When the accused casts the fatal blow, he cannot be absolutely certain that the witness will not survive the blow, and even if the blow does prove fatal he cannot be absolutely certain that she will not survive long enough to testify subject to confrontation at trial or some other proceeding. But of course this effect is highly probable and foreseeable.

[4] This is not to say that in all circumstances a purpose to render

consequences of his conduct, he realized full well that this would be the effect. And the equities of the situation hardly tilt any more in his favor if he gave no heed to the consequences of his conduct.[5]

Petitioners amicus National Association of Criminal Defense Lawyers ("NACDL") argue at some length that, if a purpose requirement is not attached to

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the witness unavailable is necessarily irrelevant in deciding whether the accused has forfeited the confrontation right. Suppose the accused engages in conduct that is not wrongful but is motivated by a desire to render the witness unavailable, and succeeds in that objective. (For example, a brother might gently persuade his sister to assert her Fifth Amendment privilege rather than accept a plea deal that would result in her testifying against him.) Whether such conduct should result in forfeiture is, in the view of *amicus*, a close question – which of course does not have to be resolved here.

[5] In varied contexts, this Court has invoked the maxim that a person is presumed to intend the natural consequences of his own acts. *E.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 932 (2005); Reno v. Bossier Parish School Bd., 520 U.S. 471, 487 (1987). Sandstrom v. Montana, 442 U.S. 510 (1979), is not to the contrary. There the Court held that an instruction that the accused was presumed to intend the ordinary consequences of his voluntary acts was invalid because the jury may have interpreted it as effectively limiting the prosecution's burden of proving every element of a criminal offense beyond a reasonable doubt. No such concerns arise in the present context, concerning a determination by the court on a preliminary matter.

In a case such as this – in which victim made a testimonial statement against the accused before the final assault and the accused was presumably aware of that fact -- denying forfeiture absent a showing of purpose to render the witness unavailable would create a horribly perverse incentive, to "finish the job" and make the assault a fatal one: If the accused had other reasons for the assault, it would be hard for the court to find that the killing was motivated by desire to prevent the victim from testifying, and so the statement would not be admitted.

forfeiture doctrine, the doctrine is capable of abuse. *Amicus* agrees that abuse is a significant danger, and discusses here two respects in which this is so. But the solution lies in careful attention to the equities of the situation at hand, not in declining to apply forfeiture doctrine where the equities plainly call for it.

1. One source of potential abuse is failure on the part of the state to act responsibly in preserving the confrontation right to the extent reasonably possible. Thus, suppose that the victim of a life-threatening assault makes a testimonial statement identifying the assailant, and that for some time after she is in such condition that it would be neither infeasible nor inhumane for her to give a deposition, subject to confrontation. (As discussed below, this was standard practice in the founding era.) Suppose further that the state, knowing of the possibility that the victim will not survive until a trial and satisfied with the statement it has in hand, takes no steps to give the accused an opportunity to be confronted with the victim. If the victim does indeed die, so the trial becomes one for murder, the state should not be allowed to invoke forfeiture doctrine to usher the statement into evidence. Of course, the accused was responsible for the ultimate death of the witness, and thus for rendering impossible the ideal opportunity for confrontation, testimony at trial. But by hypothesis, the accused's conduct did not preclude a second-best opportunity, at a pre-trial deposition or hearing. And the state, the proponent of the evidence and the entity responsible for providing the accused with an opportunity for cross-examination, has, by hypothesis, negligently or even willfully let that second-best opportunity disappear. The state should not be

allowed to nullify the accused's constitutional right to confrontation in this way.[6]

In the present case, the issue does not arise; there is no suggestion that it would have been feasible for Avie to give a deposition after the fatal attack.[7] But as developed further below, *amicus* believes that the responsibility of the state to take reasonable steps to preserve the confrontation right to the extent possible – what he has referred to as a mitigation requirement[8] – is essential to ensure that forfeiture doctrine achieves equitable results, is theoretically coherent, and accords with historical practice. There is no need

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[6] *Cf. Motes v. United States*, 178 U.S. 458, 471 (1900) (Government precluded from offering prior testimony of witness given that witness was absent from trial "due to the negligence of the officers of the government"). In *Motes*, the accused was blameless, which is not true in the hypothetical posed here. But for the reasons suggested above, this factor is not decisive. The accused should not be held to have forfeited an opportunity for confrontation that could and would have occurred, absent negligent or willful failure by the government, even given the accused's misconduct.

[7] A deposition may have been possible before the fatal attack, after Avie made her testimonial statement in response to the prior incident. Whether the state's failure to take advantage of such an opportunity should preclude it from invoking forfeiture after a subsequent, fatal attack is, in the view of *amicus*, a difficult and complicated question. (The state obviously did not know that a murder would ensue. On the other hand, it failed to make an adequate response to a serious complaint of violence, either to prevent recurrence or to preserve testimony; perhaps domestic violence prosecutions will be improved if prosecutors know that they may be dissipating evidence if they do not respond to such complaints.) In any event, the question is not presented here, and *amicus* believes the Court should do nothing to preclude unimpaired consideration of it in a future case.

[8] *See, e.g., Forfeiture, the Prosecutorial Duty to Mitigate, and Rae Carruth*, http://confrontationright.blogspot.com/2005/03/forfeiture-prosecutorial-duty-to.html.

in this case to develop a doctrine of mitigation, but its development should not be foreclosed, and recognizing its existence may help the Court place its decision in a sound theoretical context.

2. *Amicus* believes that forfeiture may arise from a serious assault, or series of such assaults, that has the foreseeable consequence of so traumatizing the witness that she is unable to testify subject to cross-examination. Indeed, *amicus* believes that recognizing this principle is critical in preventing courts from adopting an unduly narrow conception of what is testimonial for purposes of the Confrontation Clause.[9] But the confrontation right would be severely threatened if the trial court were allowed to conclude

[9] Thus, in *Hammon v. Indiana* (the companion case to *Davis)*, the State and supporting *amici*, in asking the Court not to characterize the statements involved there as testimonial, emphasized the intimidating impact of abusive behavior. This Court properly refused to "vitiate" the constitutional right in response to this problem; rather, than denying the plainly testimonial character of the statements, the Court pointed to the "rule of forfeiture" as an appropriate remedy. 547 U.S. at 832-33.

This dynamic highlights a key difference between forfeiture of hearsay objections and forfeiture of the confrontation right. The rule against hearsay has become extremely porous. It is not surprising, then, that the Federal Rules of Evidence were in force for more than 20 years before they included a forfeiture rule at all. Even with no forfeiture rule, or only a limp one, in effect, a court inclined to admit a statement will not have difficulty finding a way around the rule; *see, e.g.*, Fed. R. Evid. 807 (residual exception). Given *Crawford*, the confrontation right, by contrast, is rigid and categorical in nature. If the rule of forfeiture of the confrontation right is not fully developed, therefore, inequitable results will frequently occur. Accordingly, in both *Crawford* and *Davis* the Court immediately recognized the importance of forfeiture doctrine. In short, the bounds of the Federal Rules' version of forfeiture, Rule 804(b)(6), have no bearing at all on the constitutional question presented here.

that the accused forfeited the right on the basis of the prosecutor's statement, "I have spoken to the victim, and she has been so traumatized by the accused's misconduct towards her that she is now unable to testify." This possibility should not be prevented by the artifice of adding a purpose requirement to forfeiture doctrine, or by denying forfeiture in a case like this, which so plainly calls for it. Rather, as cases arise that are missing one or more of the elements that make this case an easy one, the Court can delineate the proper bounds of the doctrine.

Thus, a case involving not murder but wrongful conduct that allegedly had an intimidating effect on the witness would raise complexities not involved here: Should the witness, who could be brought to court but is frightened, be deemed unavailable? If so, should the unavailability be attributed to the wrongful conduct of the accused? If so, was the unavailability a foreseeable, natural consequence of the accused's misconduct? What steps should the state be required to take to ensure that it has acted reasonably in an attempt to preserve the confrontation right in whole or in part? (*Amicus* believes that some such mitigation requirement is essential, both as a matter of theory and practically, to ensure that forfeiture doctrine is not abused in the assault setting. *See Forfeiture of Confrontation Rights*, *supra*, 19 REGENT U.L. REV. at 494-95.)

*Amicus* does not pretend that these issues will be easy to resolve. On the contrary, he believes that many cases will be excruciatingly difficult. But that is no reason to cut forfeiture doctrine short. *Crawford* recognized that it would be a challenging and complex task to define the outer bounds of the category of

testimonial statements – but that did not stop the Court from enunciating the concept and applying it to an easy case. Similarly, in this case, the Court can adopt the sound principle that when the accused engages in serious misconduct that has the foreseeable consequence of rendering the witness unavailable, both at trial and for any pretrial proceeding that might reasonably be held, he forfeits the confrontation right with respect to any testimonial statements the witness has made. Further, it can apply that principle in its most obvious setting, where the wrongful act rendering the witness unavailable is murder. And other cases it can leave to the future.

## II. IMPOSING A PURPOSE REQUIREMENT ON FORFEITURE DOCTRINE WOULD REQUIRE AN ADDITION TO CONFRONTATION DOCTRINE THAT MAKES NO SENSE ON ITS OWN TERMS AND THAT CONFLICTS WITH THE THEORY UNDERLYING *CRAWFORD*.

Consider the classic "dying declaration": After receiving a fatal blow, the victim, on the edge of death, makes a statement identifying his killer. It is common ground in this case that these statements ought ordinarily be admitted. Indeed, well over a century ago, this Court noted that these statements had been admitted "from time immemorial" and that "no one would have the hardihood at this day to question their admissibility." *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). The same is no less true today. But if they are clearly admissible, the question remains why, given that many, if not all, of these statements are testimonial[10] and most have not been subjected to

[10] *Crawford*, 541 U.S. at 56 n.6. *Amicus* believes that all, or

cross-examination.

Petitioner cannot acknowledge that these statements are admissible as an application of forfeiture doctrine, because in most circumstances there is no evidence that the accused committed the murder for the purpose of rendering the victim unavailable to be a witness. Thus, petitioner is forced to contend that there is a special exception to the Confrontation Clause for "dying declarations," crafted according to traditional lines.[11] There are several serious problems with this approach.

(1) The rationale usually given for the exception is that "the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath," *Mattox*, 156 U.S. at 244. But whatever the force of this rationale in earlier times, one can hardly say that today the prospect of imminent death will universally induce speakers to tell the truth so that they will avoid eternal damnation. Imagine this thought experiment: Defense counsel and the accused are given a special opportunity to visit the hereafter to examine the deceased witness. According to the traditional rationale, articulated by this Court in a

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virtually all, dying declarations identifying the speaker's killer should be deemed testimonial. Whether they are made directly to law enforcement authorities or not, such statements are not idle chatter for the amusement and edification of the listener; they are an attempt to bring the speaker's killer to justice.

[11] *Crawford*, while clearly indicating distaste for the possibility, explicitly left unresolved the question whether there is such an exception. 541 U.S. at 56 n.6 ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.").

relatively recent pre-*Crawford* case, *Idaho v. Wright*, 497 U.S. 805 (1990), counsel would presumably turn down the opportunity, because it would be of "marginal utility." *Id.* at 820. "Couldn't do anything with her," counsel might say. "She was about to go into the presence of her Maker when she made that statement, and she wouldn't have done so with a lie upon her lips [*see id., quoting Queen v. Osman*, 15 Cox Crim.Cas. 1, 3 (Eng.N.Wales Cir.1881) (Lush, L.J.)], so there's no way I could shake her story."

(2) If the rationale were correct, it would support an exception for any statement made by the speaker while believing that death was imminent. But in fact the exception as traditionally expressed is far more limited. In particular, it is limited to statements "concerning the cause or circumstances of what the declarant believed to be impending death." *E.g.*, Fed. R. Evid. 804(b)(2).

(3) At most, the rationale would suggest that dying declarations are unlikely to be the result of deliberate mendacity on the part of the speaker. It would provide no reason to believe that the statement is free from other defects, most significantly that of failed perception. And yet some courts have applied the exception in circumstances in which the speaker had a significantly impaired ability to perceive the assault.[12]

(4) Without extreme distortion, the exception cannot reach some statements that equity plainly

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[12] See, e.g., People v. Taylor, 275 Mich. App. 177, 737 N.W.2d 790 (Mich. App.), *leave to appeal granted*, 480 Mich. 946, 741 N.W.2d 24 (2007), in which the court held admissible a victim's statement identifying the man who allegedly shot him from outside his bedroom window while he lay in bed overnight.

requires be admitted.[13] Consider the recent and highly publicized Jensen case. Julie Jensen wrote a letter, to be opened in the event of her death, indicating that if she died suddenly her husband Mark should be the prime suspect. Julie did indeed die, of poisoning, and Mark, on the basis of considerable evidence, was charged with the murder. The prosecution sought to introduce the letter, and the Wisconsin Supreme Court, relying on the decision of the California Supreme Court in this case, ultimately (and properly) held that Mark could be held to have forfeited the confrontation right.[14] But after the grant of *certiorari* in this case, the trial court sought to protect against the possibility that this Court would reverse the California decision. Accordingly, it held that there is an exception to the Confrontation Clause for dying declarations and that Julie's statement fit within it – on the mind-boggling theory that the statement, though written well before her death, did not become effective until it was read by another person after her death. (Perhaps it should be called a dead declaration rather than a dying one.)[15]

(5) Most fundamentally, even if the traditional rationale were persuasive on its own terms, it would at most support a conclusion that dying declarations are reliable. But to base a rule on that conclusion conflicts

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[13] *Amicus* believes this case is an example. The statement involved here does not fit the "dying declaration" exception – and yet, as explained in Part I, equity clearly requires that it be admissible.

[14] State v. Jensen, 299 Wis.2d 267, 727 N.W.2d 518 (2007).

[15] Links to video clips of the trial court's ruling, and of argument in response to it, may be found in the commentary to the blog posting *"If anything happens to me . . .,"* http://confrontationright.blogspot.com/2008/03/if-anything-happens-to-me.html.

squarely with the essential theory of *Crawford*:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. . . . [T]he Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

541 U.S. at 61. How bizarre, then, it would be to incorporate an exception for dying declarations – that is, to carve out one area in which the Clause does not apply precisely because the statements are believed to be so reliable.

Now note how sensibly the classic dying declaration case is addressed by forfeiture doctrine – assuming no purpose requirement is grafted onto that doctrine. The accused has forfeited the confrontation right, and therefore the dying statement is admissible, *because he murdered the victim*. (Of course, this principle applies only if the trial court makes a preliminary finding that in fact the accused murdered the victim. But so far as *amicus* is aware, in every dying declaration case, the court could and would have found at least to a preponderance of the evidence that he did so, and indeed a prosecution in which this condition is not met, despite the dying victim's accusation, is highly unlikely.[16]) The traditional limitation of the exception to statements in a homicide prosecution makes perfect

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[16] *Davis* strongly suggested that the victim's own statements may be considered in deciding whether the accused forfeited the confrontation right. 547 U.S. at 833. *Cf.* Bourjaily v. United States, 483 U.S. 171 (1987) (similar rule with respect to conspirators' statements).

sense; it is the homicide that causes the forfeiture.[17] So too does the limitation to statements concerning the cause of the speaker's expected death; that is the type of statement that a lingering victim may make that could become material in a prosecution for her murder. And the qualification that the declarant must have anticipated that her death was impending also fits quite well: If the qualification is not met, then probably a deposition of the victim could reasonably have been held, and so preserved an opportunity for confrontation, but if the qualification is not met, then it probably would not have been feasible, or humane, to hold a deposition.

Under the view presented here, then, the Confrontation Clause prohibits use of a testimonial statement against an accused to prove the truth of what it asserts unless the accused either has had or will have an opportunity to confront the witness (which should occur at trial unless the witness is then unavailable) or has rendered the confrontation unfeasible. *See Forfeiture of Confrontation Rights*, *supra*, 19 REGENT U.L. REV. at 489. *There are no exceptions.*[18]

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[17] Some 18th century civil cases were receptive to statements by deceased declarants, but not all were, *see* Craig v. Anglesea, 17 How. St. Tr. 1140, 1161 (1743), and the rule quickly became limited to criminal cases charging homocide. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 277 (J.H. Chadbourn rev. 1974). The Federal Rules of Evidence version of the exception, Rule 804(b)(2), was drawn more expansively to include civil cases. *See* Adv. Comm. Note. to Fed. R. Evid. 804(b)(2). So far as *amicus* is aware, the rule has never been applied to non-homicide criminal cases. *See* LEONARD MACNALLY, THE RULES OF EVIDENCE 381, 386 (1802) (referring to rule as applicable "on a trial for murder" and in civil cases); ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE 124 (1810) (similar).

[18] Forfeiture, in this view, is not best considered an exception to

Though of course complexities and ambiguities lie within this framework, its basic principles are clear and simple, making them easily understood, worthy of respect, and so capable of enduring for generations. *See* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 112 (1992). That is a benefit utterly lost if the structure depends on incorporating an unpersuasive exception that warrants ridicule rather than respect, and that conflicts with the basic nature of the confrontation right. Over the long run, the devastating flaws in the approach advocated by the petitioner would have a substantially corrosive effect on that right.

## III. A PURPOSE REQUIREMENT IS INCONSISTENT WITH THE RESULTS OF FRAMING-ERA CASES.

In light of the considerations presented above, a purpose requirement should not be engrafted onto

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the right, but rather, like waiver, the consequence of the accused's own conduct estopping him from asserting the right in given circumstances. The accused may be estopped from later asserting the confrontation right not only if he renders the witness unable to testify subject to confrontation but also if he pleads guilty, Boykin v. Alabama, 395 U.S. 238, 243 (1969), consents to admission of the evidence, Diaz v. United States, 223 U.S. 442, 450 (1912), voluntarily absents himself from trial, Taylor v. United States, 414 U.S. 17 (1973), or so disrupts trial that he is excluded from it, Illinois v. Allen, 397 U.S. 337, 342-43 (1970). The accused can be estopped from asserting most of the rights enumerated in the Sixth Amendment. *See, e.g.*, People v. Ortega, 12 Misc.3d 1182(A), 824 N.Y.S.2d 765 (N.Y. Sup. Ct. 2006) (citing forfeiture holdings in several contexts, including speedy trial and right to counsel).

forfeiture doctrine unless that was the unmistakable command of the framers of the Confrontation Clause. And that is not remotely true.

At the outset, it must be recognized that forfeiture doctrine – the existence of which is not disputed – is not prescribed in the text of the Constitution. It is, as this Court has repeatedly indicated, equitably based. *Reynolds*, 98 U.S. at 158-59; *Crawford*, 541 U.S. at 62; *Davis*, 547 U.S. at 833. Traditionally, it has been based on a principle that goes back at least to Roman law,[19] and that has been a part of English law at least since the 16th century,[20] that no one should profit from his own wrong.[21] The text of the Confrontation Clause did not in itself express this principle – which of course prescribes forfeiture in the present case – but was rather written against the background of it. However significant framing-era practice may be in interpreting the text of the Constitution, other factors take greater prominence in resolving a question that the text does not address. *See Printz v. United States*, 521 U.S. 898, 905 (1997).

But in fact, if one focuses not on rhetoric but on the

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[19] Justinian's Digest prescribed as one of its Rules of Early Law: "No one is allowed to improve his own condition by his own wrongdoing." 2 THE DIGEST OF JUSTINIAN 50.17.134.1 (Alan Watson ed. rev. ed. 1998).

[20] Ridgeway's Case, 3 Co. Rep. 52a, 52b, 76 Eng. Rep. 753, 755 (K.B. 1594).

[21] *Amicus* has argued that this principle does not quite fit the forfeiture idea, and that the more precise governing principle is that no one should be able to complain about the consequences of his wrongdoing. *Chutzpa*, *supra*, at 516-17. But the two are sufficiently close that it is easy to slip from one to the other – and indeed this Court did so in consecutive paragraphs in *Reynolds*. 98 U.S. at 158-59.

actual results of cases from the framing era, it becomes clear that they are at least as consistent with the theory presented here as with the one presented by the petitioner and NACDL in their thoroughly researched briefs.

Putting aside one rather adventurous and obviously doomed argument advanced by the NACDL,[22] most of

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[22] This is the argument that in the framing era forfeiture was nothing more than a species of unavailability justifying the admission of testimony that had been subjected to cross-examination. *If* this were true, and *if* the Court were bound to follow such a limitation, the devastation would be considerable. The version of forfeiture prescribed by Fed. R. Evid. 804(b)(6) would be rendered unconstitutional, as NACDL appears to recognize, Br. at 5, 13, but that would be just the beginning of the damage. Because the premise of the argument is that the only effect of forfeiture doctrine is to add to the otherwise permissible grounds for deeming a witness unavailable, then grounds not stated in the framing era would no longer be permissible – not just with respect to forfeiture but for all prior testimony. Thus, privilege, refusal to testify, lack of memory, and general inability of the prosecution to procure the witness's attendance, *see* Fed. R. Evid. 804(a)(1)-(3), (5), would all be rendered improper bases for treating prior testimony that had been taken subject to an opportunity for confrontation as satisfying the Confrontation Clause.

Moreover, the only conceivable consequence of any forfeiture doctrine, according to the NACDL argument, would be that the witness would be deemed unavailable, for purposes of determining whether a prior testimonial statement subject to an opportunity for confrontation should be admitted. If the witness was dead, forfeiture doctrine could therefore have no effect at all. If the witness was merely "kept away," the only effect of forfeiture doctrine would be to compensate, in that particular circumstance, for the fact that generally the prosecution could no longer maintain that a witness should be deemed unavailable for Confrontation Clause purposes if it was unable to secure her attendance, *see* Fed. R. Evid. 804(a)(5) – and even then the doctrine would only apply if the accused had been subjected to an

the space in the briefs of the petitioner and of the NACDL demonstrates two points that are neither controversial nor dispositive. First, the cases admitting statements under a "dying declaration" exception usually articulated a trustworthiness rationale, based on the imminence of apparent death. *Amicus* acknowledges this point, with the caveats that unavailability of the witness was also part of the rationale, that in this era treatise writers indicated a forfeiture rationale for dying declarations,[23] and that there are 19th century cases stating this rationale even

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opportunity for cross-examination. This, if the accused, knowing that a witness had given grand jury testimony implicating him, abducted the witness on the way to the trial and kept her hidden nearby until trial was over, forfeiture would not be possible.

Beyond that, the premise of the argument is not true. The NACDL points out that some of the early statements to which forfeiture doctrine applied were Marian examinations. Even assuming that these were uniformly subjected to an opportunity for confrontation – an assumption that has been hotly contested, *see* Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) – this proves nothing at all, because there was no rule that forfeiture could be applied only to such statements. Indeed, the NACDL acknowledges that cross-examination was not the rule in with respect to statements made before the coroner. Br. at 9. The NACDL is not helped by later American cases, not involving forfeiture, that reject these statements because not made subject to confrontation. Br. at 10. Furthermore, as developed in Part II and in the balance of this Part, *amicus* contends that the "dying declaration" cases in reality represent the application of forfeiture doctrine to a species of statements not made subject to confrontation.

[23] 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803) [hereinafter "PLEAS OF THE CROWN"] (justifying exception on the basis that "the usual witness on occasion of other felonies, namely the party injured, is gotten rid of"); SWIFT, DIGEST, *supra*, at 124 (following East).

more explicitly.[24] Second, the cases admitting statements under an explicit forfeiture rationale concerned witness tampering – that is, conduct motivated by a desire to prevent a witness from testifying. *Amicus* acknowledges this point as well. Nevertheless, the framing-era decisions do not compel the conclusion that forfeiture required a purpose to render the witness unavailable.

One fact, not mentioned by petitioner or NACDL, stands out from their historical demonstrations: They cite no decision from the framing era that fits the mold of this one, in which the testimonial statement was made before the crime being charged. *Amicus* has not been able to find any, either. This is not surprising. Such a statement is likely to be made – as in the present case – only if the accused has committed a crime against a given victim repeatedly, or over an extended period of time. And that scenario is likely to arise only in the case of domestic violence. But non-lethal domestic violence was rarely prosecuted in the founding era.[25] Thus, even in a case involving, as this

[24] State v. Bohan, 15 Kan. 407, 418 (1875) (holding that sole ground justifying "dying declaration" exception is "that the murderer, by putting the witness, and generally the sole witness, of his crime beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime"); State v. McDaniel, 8 Smedes & M. 401, 416, 1847 WL 1763 (Miss.Err. App. 1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death.").

[25] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996), summarizes the law and practice:

> The Anglo-American common law originally provided that a husband, as master of his household, could subject his

one does, one or more incidents of abuse before a murder that was prosecuted, the victim would almost certainly not make a testimonial statement to authorities after the earlier statement and before the fatal assault.[26] If there are any cases fitting this pattern, they must be quite rare, far too few to constitute such a settled practice as to have any guiding significance two centuries later.

Examining the cases that *were* decided reveals that their holdings are entirely consistent with the principles advocated here – that is, that an accused forfeits the confrontation right if by murdering the victim he renders her unavailable for confrontation, but the state cannot forgo reasonable opportunities to preserve the right.

Thus, even though the victim of a murder was dying, it was routine practice in the framing era to

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> wife to corporal punishment or "chastisement" so long as he did not inflict permanent injury upon her. During the nineteenth century, . . . authorities in England and the United States declared that a husband no longer had the right to chastise his wife. Yet, for a century after[, . . . w]hile authorities denied that a husband had the right to beat his wife, they intervened only intermittently in cases of marital violence . . . .

*See generally, e.g.*, SOCIETY FOR THE PREVENTION OF VICE, THE CONSTABLE'S ASSISTANT (2d ed. 1808) (manual giving no hint of the existence of domestic violence).

[26] The lack of a professional police force may have further dissuaded any victim of domestic violence who might have been inclined to make a report. *See, e.g.*, THE CONSTABLE'S ASSISTANT, *supra*, at 5-6 ("That few Constables are sufficiently acquainted with their Duties and Powers is justly a subject of general complaint. . . . [F]ew persons know in what cases they are entitled to call for the interference of the Constable, and how he is bound to act when called upon.").

take the victim's testimony according to the usual deposition procedures, *in the presence of the accused.*[27] If the accused was *not* present – meaning that the authorities had not done what they reasonably could do to preserve the confrontation right – then the deposition ordinarily could not be admitted, notwithstanding the ultimate death of the victim.[28] Only if the victim was aware he or she was on the verge of death was the failure to bring the accused into the presence of the victim excused.[29] But that circumstance, heavily stressed by the petitioner and NACDL, is a rather good proxy for a determination of when it is no longer feasible and humane to arrange a confrontation between assailant and victim: Time is probably short, the victim may not have the energy to face the accused,

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[27] *See* King v. Radbourne, 1 Leach 457, 168 Eng. Rep. 330 (1787); King v. Forbes, Holt 599, 171 Eng. Rep. 354 (1814); King v. Smith, Holt 614, 171 Eng. Rep. 357 (1817).

[28] *See* King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791); Thomas John's Case (1790), reported in EAST, PLEAS OF THE CROWN, *supra*, at 357-58; Henry Welbourn's Case (1792), reported in *id.*, at 358-60. In *Forbes*, *supra*, the accused was present for only part of the deposition – and only that part was held admissible. In *Smith*, *supra*, also, the accused appeared when the proceeding was well under way – but the victim was resworn, the testimony already given was read back, the victim reaffirmed it, and all was held admissible.

[29] *E.g.*, King v. Woodcock, 1 Leach 500, 168 E.R. 352 (K.B. 1789). THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (1801) presents a nice juxtaposition, summarizing the law and showing the relation of the deposition and dying declaration rules. On pages 40-41, Peake asserts that a Marian deposition may be admitted at trial if the witness has died *and* the accused was present, but that if the accused was not present the deposition may not be admitted. A listing of Errata, p. xii, qualifies this by noting that the statement may yet be admitted if the witness was "apprehensive of, or in imminent danger of death."

and simple decency may call for allowing the victim to face death without being in the presence of his or her murderer. A deposition not being a practical possibility, the difficulty having been created by the accused's wrongdoing, and the prosecution not having forgone any reasonable opportunity to preserve the right, forfeiture is appropriate.

Significantly, so far as *amicus* is aware, there is only one criminal case from the framing era involving a statement by a person about to die but *not* subject to forfeiture analysis – because the defendant was not the cause of impending death. And that statement was not admitted, the court using strained logic to avoid the apparent command of the "dying declaration" exception.[30]

The best understanding of the framing-era "dying declaration" cases, then, is as reflections of a forfeiture principle that (a) is not limited to witness-tampering cases in which the accused engaged in the forfeiting

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[30] The case is King v. Drummond, 1 Leach 337, 168 Eng. Rep. 271 (1784). A prisoner named Edwards, about to be executed, had confessed to a chaplain that he, rather than Drummond, committed the robbery for which Drummond was later charged. The court held that the statement could not be admitted because Edwards live, as a convict, could not have given testimony under oath, and so Edwards dead could not be heard from. But if the usually stated rationale for the hearsay exception, based on the fear created by the portent of death, were determinative, one might have expected that it would apply fully to Edwards. An oath might not have meant much to him in ordinary course, but there is no reason to believe he would be immune to the fear of adverse consequences to be suffered by facing an immediate final judgment with a fresh lie upon his lips. If the case arose today, the statement would fall outside the exception because it did not concern the cause of impending death – a qualification that has little or nothing to do with the supposed reliability rationale.

conduct for the purpose of rendering the witness unavailable, and (b) is qualified by the principle that the authorities must act reasonably to preserve the confrontation right to the extent reasonably feasible. True, this was not the rationale usually articulated,[31] but if the focus is on what the courts *did* rather than what they *said* the picture from the framing era is clear – and it is perfectly consistent with the equitable principles discussed in Part I of this brief and the structure of confrontation doctrine discussed in Part II.

## CONCLUSION

To decide this case properly, the Court need only hold that if the trial court determines as a preliminary matter that the accused rendered confrontation with the victim impossible by murdering her, then the accused should be held to have forfeited the confrontation right. The same principle can apply to other serious misconduct that has the foreseeable consequence of rendering the victim unavailable to testify at trial, but it will be time enough to address the complexities of these situations when they arise in a properly presented case. To reach equitable results,

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[31] One reason for this may have been that the judicial role in making preliminary determinations of fact was not yet universally understood; in *Woodcock*, the trial judge left it to the jury to determine whether the victim was sufficiently aware of impending death for the exception to apply, 1 Leach at 504, 168 Eng. Rep. at 354, and in *John's Case* the trial judge left the matter vague, so the reviewing judges felt the need to assert that the matter was not for the jury. EAST, PLEAS OF THE CROWN, *supra*, at 358. In this setting, courts may have been disinclined to articulate a theory under which admissibility would depend on a preliminary determination that the accused had committed the murder charged.

to play its proper integral role in the framework of the Confrontation Clause, and to adhere to the results of framing-era cases, forfeiture doctrine must be attended by a corollary that the accused does not forfeit the confrontation right if the state has forgone reasonable opportunities that would have preserved the right in whole or in part. The Court should do nothing in this case to constrain future development of that corollary doctrine – but questions related to it are not presented by this case, and so they too may be left to the future.

Respectfully submitted,

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March 26, 2008

# AMICUS CURIAE BRIEF

11

3-26-08

No. 07-6053

IN THE
# Supreme Court of the United States

DWAYNE GILES,
*Petitioner,*

*v.*

STATE OF CALIFORNIA,
*Respondent.*

**On Writ of Certiorari to the Supreme Court of California**

**BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**


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## INTEREST OF *AMICI CURIAE*[1]

The National Association of Counsel for Children (NACC) is a section 501(c)(3) nonprofit child advocacy and professional membership association founded in 1977. The mission of NACC is to improve the condition of America's court-involved children. NACC programs include professional training and technical assistance, policy advocacy, and programs to establish the practice of law for children as a legal specialty. NACC has approximately 2500 members, representing all fifty-one jurisdictions. Its members include primarily attorneys and judges but also other professionals involved with children and families in the legal system.

The American Professional Society on the Abuse of Children (APSAC) is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. Founded in 1987, APSAC has more than 2,500 members, including professionals from all fifty states. APSAC seeks to increase knowledge about abuse and to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals.

*Amici* submit this brief to highlight the importance of forfeiture standards in assessing the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

admissibility of testimonial hearsay from witnesses who are either too young or too scared to testify. Consistent with Framing Era law and sound Constitutional policy, *amici* urge the Court to articulate the relevant constitutional standards in terms that prevent defendants from taking advantage of the incapacities of child witnesses.[2]

## SUMMARY OF THE ARGUMENT

A criminal defendant's confrontation right extends to all testimonial hearsay, unless an equitable exception existed at common law. The question presented in this case concerns one such exception—forfeiture by wrongdoing. More precisely, the Court must decide whether this exception is limited to circumstances when defendants, in their wrongdoing, *both* cause and specifically intend to create a witness's absence.

This issue critically impacts child witnesses and victims. This Court's prior historical analyses in *Crawford* and *Davis* did not specifically consider how Framing Era courts handled children's testimonial hearsay. Thus, the Court has not explicitly identified an appropriate Confrontation Clause standard for this unique category of cases.

In the absence of specific guidance, courts have repeatedly cited *Crawford* as requiring the categorical exclusion of such evidence, contrary to

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[2] *Amici curiae* acknowledge the assistance and contributions of Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guiardo Chair in Law and Psychology, University of Southern California, and the assistance of Tracey Chenoweth, Nicole Hebert, Joel Purles, Maya Roy, and Abe Tabaie, members of the University of Southern California Law School Class of 2008.

the prevailing practice at the time of the Framing. As an unfortunate result, courts now routinely reverse murder and child rape convictions on this basis, and prospective prosecutions are impeded. These results do not simply represent bad policy, but are in sharp contradiction to the pre-Framing practice that *admitted* unconfronted hearsay reports of child victims when they were too young to testify in court.

This Framing Era rule is well documented. It was cited by the leading jurists of the era both in their judicial decisions and in their extracurial writings. In fact, case reports from the period document that members of the Twelve Judges of England employed this rule when presiding over Framing Era criminal trials.

The rationale for this rule was simple: The nature of the defendant's acts in these cases (e.g., child rape) ensured that the natural and often only witness to the crime (e.g., the child victim) would be unavailable to testify—the witness was predictably incompetent to testify at the time the defendant acted. Paralleling the rationale articulated for admitting dying declarations, courts cited principles of moral necessity and equitable fairness to admit this hearsay in derogation from standard procedure—"the nature of the offense, which is most times secret" made it such that "no other testimony can be had of the very doing of the fact."[3]

As a leading jurist of the era wrote: "In cases of foul facts done in secret, where the child is the party

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[3] 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736).

injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law."[4] Regrettably, courts endeavoring to apply *Crawford* have reached the opposite result and excluded reliable and often corroborated evidence without regard to these equitable principles from the Framing Era. *Amici* hope to alert the Court to this concern so that the rule the Court fashions may accommodate these ancient equitable principles and guide courts accordingly.

Historically, this exception for witnesses of tender years carried no requirement that the defendant "intend" unavailability at trial or "cause" that unavailability. To the contrary, the rule operated in circumstances in which the defendant did not "cause" the incapacity of youth but merely took advantage of that vulnerability in perpetrating his crime. Nevertheless, the strong equitable considerations in play—necessity and fairness—effectuated a forfeiture of confrontation rights in those cases.

The forfeiture standard that this Court articulates in this case will have an immediate and serious impact on how testimonial hearsay from children is assessed. *Crawford* should not be extended to unavailable child witnesses without considering the strong equitable principles applied by Framing Era courts. Framing Era practice demonstrates that there is no constitutional basis for categorically insulating defendants in cases in which defendants act in the face of the predictable

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[4] Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 415–16 (Dublin, Elizabeth Watts 1768).

unavailability of vulnerable or very young witnesses. Sound constitutional policy likewise mandates the same conclusion.

Part I of this Brief describes the pre-Framing treatment of child hearsay at common law. Part II demonstrates how the rigid application of *Crawford* to child hearsay has led to unjustifiable results. Part III address reliability concerns regarding child hearsay.

## ARGUMENT

### I. THE PRE-FRAMING HISTORICAL RECORD DEMONSTRATES THAT THE FRAMERS WOULD NOT HAVE UNDERSTOOD THE CONFRONTATION CLAUSE TO APPLY CATEGORICALLY TO CHILDREN'S TESTIMONIAL HEARSAY.

Children's out-of-court reports of abuse were routinely admitted by English courts in the pre-Framing period without regard to a defendant's confrontation right. These reports included statements that would today be categorized as "testimonial." The rationale for admitting this evidence was one of necessity and fairness, mirroring the justification advanced for the dying declaration exception. These guiding principles meant that a defendant could not complain of his inability to confront a hearsay declarant when his wrongful actions had created the situation that ensured that the primary witness to his crime would be unavailable.

### A. This Court Recognizes the Constitutionality of Hearsay Exceptions That Existed at the Time of the Framing.

This Court has long recognized that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see also Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The purpose of [the Confrontation Clause], this court often has said, is to continue and preserve that [common-law] right, and not to broaden it or disturb the exceptions."); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (interpreting Confrontation Clause as "securing to every individual such [rights] as he already possessed as a British subject").

Early American cases specifically referencing confrontation rights appear limited to those that addressed statements "of the most formal sort." *Davis v. Washington*, 547 U.S. 813, 826 (2006). Thus, this Court has held that the best evidence of the Framers' intentions is to be found in Framing Era British sources, which are "progenitors of the Confrontation Clause." *Id.*[5] The Court treats the

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[5] This Court examined the inconsistencies of the early American approach to confrontation in *Mattox*. 156 U.S. at 240–42; *cf. Davis*, 547 U.S. at 825 n.3 (comparing *State v. Atkins*, 1 Tenn. 229, 229 (Super. L. & Eq. 1807) (disallowing even cross-examined prior testimony), with *Kendrick v. State*, 29 Tenn. 479, 491 (1850) (allowing it)). In *Mattox*, the Court upheld the constitutionality of admitting a deceased declarant's prior testimony. 156 U.S. at 244. The Court emphasized that, although early American courts originally had excluded such hearsay, both later American cases and Framing Era British cases clearly supported admissibility. *Id.* at 240–42.

Clause as incorporating the parameters and limitations that were recognized at the time of the Framing. *Crawford*, 541 U.S. at 54; *Salinger*, 272 U.S. at 548; *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897); *Mattox*, 156 U.S. at 243.

### B. A Tender-Years Exception Founded on Necessity and Fairness Applied at the Time of the Framing to Admit Children's Hearsay Without Confrontation.

#### 1. Children's Unconfronted Reports of Abuse Were Routinely Admitted in Framing Era Criminal Prosecutions When the Child Was Unable to Testify.

Eighteenth-century English courts observed a long-standing exception to the hearsay rule that applied to the accusatory statements of child rape victims who were too young to testify. Sir Matthew Hale's treatise, which was written in the late 1600s but not published until 1736, noted that "if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736). Echoing Hale, Sir William Blackstone noted that "the law allows what the child told her mother, or other relations, to be given in evidence." 4 William Blackstone, *Commentaries on the Laws of England* 214 (Oxford, Clarendon 1769).

The treatises took the admissibility of unavailable children's hearsay for granted when they argued that young children, who were presumed incompetent to take an oath, should

nevertheless be allowed to testify unsworn. *See id.*; 1 Hale, *supra*, at 634. The oath requirement for live testimony, not the admissibility of hearsay, was the only issue regarding child witnesses that occupied the Twelve Judges[6] during the eighteenth century. *See R. v. Powell*, 1 Leach 110, 168 Eng. Rep. 157 (1775); *R. v. Travers*, 2 Strange 700, 701, 93 Eng. Rep. 793, 794 (Kingston Assize 1726) (Raymond, C.J.); *cf. R. v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), discussed *infra* Part I.B.4.

*Rex v. Powell*, a child rape case tried at the York assizes in 1775, illustrates the extent to which the practice of admitting the hearsay reports of abused children was well accepted at the time. *See* W. Williamson, *The Trials at Large of the Felons, in the Castle of York* 17–22 (York, N. Nickson 1775). In *Powell*, the defense attorney strenuously objected to receipt of the six-year-old victim's hearsay. *Id.* at 19. The judge, Sir Henry Gould, Justice of the Court of Common Pleas, rejected the defense argument. *Id.* Justice Gould not only allowed the hearsay, but also questioned the unsworn child. *Id.* at 19, 20–21.[7] Justice Gould acknowledged that there was disagreement over the propriety of questioning

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[6] The Twelve Judges of England comprised the four jurists who presided over each of the three royal courts—the Courts of the King's Bench, Common Pleas, and Exchequer. The Twelve Judges would meet periodically in a quasi-appellate capacity to review points of exception. *See, e.g.*, John H. Langbein, *The Origins of Adversary Criminal Trial* 212–13 (2003). Individually, the same jurists would also ride circuit in the regional assizes to preside over local criminal prosecutions. *See, e.g., id.* at 181 & n.9.

[7] The detailed case report provides no basis for thinking that the defendant was afforded any opportunity to cross-examine the witness. *See* Williamson, *supra*, at 20–21.

unsworn child witnesses, but, "[w]ith regard to the admitting the declaration of the child to the mother, lord Hale speaks of that as a *clear and settled thing*; for he says, if you hear the child at second hand, she should be heard also at first hand." *Id.* at 19 (emphasis added). Justice Gould reserved the question regarding the child's unsworn testimony for the Twelve Judges to consider. *See id.* The Twelve Judges (albeit less than unanimously) held that the unsworn testimony should not have been received. *See Powell*, 1 Leach at 110, 168 Eng. Rep. at 157. The admissibility of the hearsay went unquestioned.

Because the opinions of the Twelve Judges focused on the propriety of unsworn testimony—rather than on the receipt of children's hearsay or the related absence of confrontation—the best source for illuminating Framing Era treatment of unavailable children's hearsay is the Old Bailey Session Papers, a commercial publication summarizing criminal trials at London's Old Bailey, the felony trial court for London and the adjoining county of Middlesex.[8] The jurists who presided over

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[8] The Old Bailey Session Papers (OBSP) were published from the late-seventeenth century until the early nineteenth century as periodicals under titles such as *Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery*. *See* Langbein, *supra*, at 180 n.7. A near-complete collection of the OBSP reports is available online in a searchable format at www.oldbaileyonline.org. Citations herein to cases reported in the OBSP will begin with the defendant's surname, followed by notation that the case is found in the OBSP, the case's date, and the online case reference number that allows retrieval of the report at www.oldbaileyonline.org. Scholars consider the OBSP—which often includes detailed, near-verbatim reports of trials—to be one of the best available sources for illuminating eighteenth-century English criminal procedure. *See* John H.

trials at the Old Bailey included the Twelve Judges, who also sat on the regional assize circuits. *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 17, 181 (2003). "Hence, while the special problems of the metropolis shaped the trial procedure that we see in the Old Bailey, there was no means of confining the developments to London. What was created was not London law but English law." *Id.* at 181.

In a review of all child rape cases reported in the Old Bailey Session Papers from 1684 to 1789, twenty-two cases were identified in which thirty witnesses repeated children's hearsay and no mention was made of *any* testimony by the child, either sworn or unsworn. Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1041 (2007). These cases spanned almost the entire length of the search, from 1687 to 1788. *Id.*

**2. Testimonial Statements Describing the Crime and Identifying the Defendant Were Admitted Without Confrontation.**

Nothing in the Old Bailey Session Papers suggests that children's hearsay was limited to nontestimonial statements or statements that had been subject to earlier cross-examination. The children's hearsay detailed the facts of the charged crimes and identified the defendants as the perpetrators. In court, the children's statements were most often testified to by family members

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Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 268–72 (1978).

(seventeen witnesses), but the courts also heard testimony from neighbors and other nonfamily members (five witnesses), medical personnel (five witnesses), and witnesses to formalized examinations of the child victims (three witnesses). *Id.* at 1041–42.

In only one case could the child's report be described as an emergency cry for help. *See Street*, OBSP (Aug. 27, 1725) (t17250827-14). The more common case was one in which a parent had noticed signs of venereal disease, questioned the child, and then had the child examined by a surgeon. Of course, any signs of venereal disease would necessarily take some time to appear. Indeed, the reports often explicitly describe the delay between the time of the rape and the time when the child victim made her report. *See Craige*, OBSP (July 3, 1771) (t17710703-33); *Allam*, OBSP (Sept. 7, 1768) (t17680907-40); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25). In *Powell*, the York assizes case discussed above, Justice Gould considered Hale's reference to complaints made "presently" and rejected any requirement that the complaints be made "immediately," holding instead that the term meant "in convenient time, when it appears to the parent that the child is wronged." Williamson, *supra*, at 19.

In only three cases did it appear that any of the children's reports were made in the presence of the defendant. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18) (statement given to magistrate); *Tibbel*, OBSP (Oct. 16, 1765) (t17651016-2) (neighbor confronted the defendant with the child present); *Senor*, OBSP (Aug. 28, 1741) (t17410828-

63) (statement made to local justice of the peace). In *Ketteridge* and *Tibbel*, the report was specifically made to identify the defendant as the perpetrator. Cross-examination is not mentioned, which is unsurprising considering the children were incompetent to testify at trial.

Nor did the Framing Era jurists treat the issue of admissibility lightly. In several cases, otherwise admissible hearsay statements were nevertheless excluded if deemed unreliable. *See, e.g.*, *Grimes*, OBSP (May 30, 1754) (t17540530-1) (excluding the victim's hearsay statements that were obtained by the parent's coercive questioning). Similarly, the importance to these prosecutions of unconfronted hearsay cannot be diminished by noting what appears to be the era's high acquittal rate for rape.[9] Rape prosecutions utilizing unavailable children's hearsay exhibited acquittal rates similar to those of rape cases generally, including adult rape prosecutions in which the victim testified. *See* Lyon & LaMagna, *supra*, at 1047–48.

The fact that this hearsay was admitted cannot be linked to witness tampering or intimidation. The hearsay was allowed without evidence of coercion. Threats were mentioned in only a few cases, and evidence of threats appeared to be admitted only to explain the victim's delay in reporting the crime. *See Craige*, OBSP (July 3, 1771) (t17710703-33); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25). Threats were not offered as a foundation for finding

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[9] In Framing Era practice, an unavailable child's hearsay was insufficient to justify a capital rape conviction, although it could support assault or attempted rape charges. Lyon & LaMagna, *supra*, at 1052; *see also* Langbein, *supra*, at 241 n.277.

that the defendant had forfeited confrontation rights. Rather, the rationale for forgoing confrontation lay in the rules of equity.

### 3. The Rationale for Admitting Hearsay from Unavailable Children Was That the Defendant's Actions Made Admission Both Necessary and Fair.

The rationale for admitting unavailable children's hearsay reports without confrontation was explained in the leading commentaries of the era. Sir Matthew Hale, Chief Justice of the King's Bench, argued that this procedure was necessary considering the nature of the defendant's wrongful acts: "The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the fact when it is done." 1 Hale, *supra*, 634. Sir William Blackstone concurred: "[T]he law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof." 4 Blackstone, *supra*, at 214.

Sir Francis Buller, who sat on the King's Bench from 1778 to 1794 during the heart of the Framing Era, elaborated on the equitable rationale: "In cases of foul facts done in secret, where the child is the party injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law." *See* Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 415–16 (Dublin, Elizabeth Watts 1768).

The necessity and fairness rationale for the tender-years exception was remarkably similar to that expressed by Framing Era authority for other exceptions, such as the dying declaration exception. Lord Chief Justice William Lee of the King's Bench explained that the general principle of necessity that permitted such exceptions was "not an absolute necessity, but a moral one." *Omychund v. Barker*, 1 Atk. 21, 46, 26 Eng. Rep. 15, 31 (1744). Sir Edward Hyde East described the rationale for allowing unconfronted dying declarations in terms parallel to Hale's explanation for the use of children's hearsay: "Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness . . . the party injured himself, is gotten rid of." 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 353 (London, A. Strahan 1803); *cf.* 1 Hale, *supra*, at 634.[10]

The moral necessity for admitting the statements of both young children and dying victims was that the defendant's actions had ensured that the primary witness to his crime would be unavailable to testify. In murder cases, the defendant caused the subsequent unavailability by killing a primary witness. In child rape cases, the defendant's abuse of a vulnerable and predictably unavailable victim in secret ensured that the only

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[10] This Court has cited these principles in upholding the dying declaration exception. *See Carver v. United States*, 164 U.S. 694, 697 (1897) (holding that admission was proper based on "necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present"); *Mattox*, 156 U.S. at 244 (admission based on "necessities of the case, and to prevent a manifest failure of justice").

witness to his crime would be unavailable later. It was never argued in either type of case that the defendant had to intend (or even contemplate) the testimonial effects of his actions. Rather, the consequences of the defendant's actions could, in fairness, be held against him. In both types of cases, the principles of moral necessity and equitable fairness ensured that the defendant would not be allowed to create a situation in which the state's primary witnesses were unable to give evidence due to the nature of the defendant's actions.

#### 4. *Brasier* Ended the Presumption of a Child's Incompetence and the Use of Unsworn Testimony, But Not the Practice of Admitting Unavailable Children's Hearsay.

In 1779, in *Rex v. Brasier*, the Twelve Judges unanimously held that children should not categorically be presumed incompetent, but that even the youngest child should be allowed to give sworn testimony if the child could demonstrate understanding of the oath. This ended the practice of allowing children to testify unsworn. *Brasier*, 1 Leach at 200, 168 Eng. Rep. at 202–03; 1 East, *supra*, at 443–44; *see also Wheeler v. United States*, 159 U.S. 523, 524–25 (1895).

Because the Twelve Judges believed that the five-year-old victim in the case might have been found competent, they held that her hearsay should not have been received—that is, necessity was not established as unavailability had not been established. *See Brasier*, 1 Leach at 200, 168 Eng. Rep. at 203; *see* also *Commonwealth v. Bardino*, 3

Berks 350, 1911 WL 3681 (Pa. O. & T. 1911) ("As far back as Brazier's Case, 1 East P. C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was but saying . . . that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist"). Although the Judges discussed the admissibility of the hearsay if the child should be presumed incompetent, they did not resolve that issue, because they eliminated the presumption that led to making the hearsay necessary in that case. *See* 1 East, *supra*, at 444.

*Brasier* was about unsworn live testimony, not inadmissible hearsay. After *Brasier* was decided, Framing Era courts continued to admit hearsay from incompetent children in criminal trials. *See* Lyon & LaMagna, *supra*, at 1044–45. For example, four months after *Brasier* was decided, one of the Twelve Judges, Sir Beaumont Hotham, Baron of the Court of Exchequer, presided over a child rape case at Old Bailey. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18). Following *Brasier*, Baron Hotham did not presume the four-year-old victim to be incompetent; rather, he attempted to qualify the child to take the oath. *See id.* When the young victim failed to qualify, Baron Hotham allowed the mother to testify to the child's reports of abuse. *Id.*

This same practice was followed by other jurists in even later cases. *Rex v. Fyson* in 1788 illustrates the use of an unavailable child victim's hearsay nine years after *Brasier* was decided. *See Fyson*, OBSP

(June 25, 1788) (t17880625-93). There, Judge James Adair first asked the father whether the child might be competent to take the oath, but the father testified that she was not. *See id.* The judge then asked, "Do you know any thing of this business of your own knowledge?" *Id.* The father proceeded to testify to two out-of-court statements by the child: her response to her mother's initial discovery of the abuse, and her account when she showed her father "where the affair was committed." *Id.* Immediately after the receipt of this second hearsay statement, the defense counsel began his cross-examination, with no objection noted in the report. *See id.*[11]

Subsequent discussions of *Brasier* confirmed that the Twelve Judges did not intend to disrupt the equitable principle that a child's unconfronted hearsay might be admitted as a matter of moral necessity and fairness when the child was unqualified to testify in court. As late as 1840, Baron Parke noted: "In Brazier's case, the child . . . was only five years old, and incapable of taking an oath; and it was there held, that the complaints she made to her mother and another woman on her coming home, were receivable in evidence, as she herself was not heard on oath." *R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) (citation omitted). Baron Parke concluded: "At the time of Brazier's case, it seems to have been considered, that, as the child was incompetent to

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[11] Commentators who have opined that *Brasier* affected the admissibility not only of unsworn in-court testimony, but of children's hearsay as well, have failed to review trial reports post-*Brasier*. *Cf.* Langbein, *supra*, 241.

take an oath, what she said was receivable in evidence." *Id.*

Dean Wigmore agreed, citing the exception in his seminal treatise: "[I]n Brazier's case, the use of these complaints, not merely as a formal prerequisite nor yet as corroborative, but *assertively as evidence of the details related*, was perceived; and it was seen to be necessary to use them, if at all, as a Hearsay exception." 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1760, at 2271 (1904) (emphasis added). Dean Wigmore summarized: "If the female was an infant and incompetent to testify there would be some reason for doing this on the principle of necessity." *Id.*

The underlying principles of moral necessity and equitable fairness were thus utilized throughout the Framing Era to prevent a defendant's actions from ensuring that evidence from the primary witnesses to his crime was unavailable at trial. A defendant could not cause the unavailability of a witness and then claim the right to confront him. Nor could a defendant act in the face of the predictable unavailability of a natural key witness and later complain of his inability to cross-examine the witness. *Brasier* did not change this equitable rule.

### C. The Rule Articulated in This Case Should Respect the Historical Equitable Exception to Confrontation That Applied When the Nature of a Defendant's Actions Ensured That Key Witnesses Would Be Unavailable.

English practice at the time of the Framing demonstrates that there is no valid distinction between the actions of a defendant that *cause* a witness's unavailability and those that take advantage of a vulnerable witness's prospective unavailability. *Amici* respectfully suggest that this Court should not articulate a rule that recognizes such a distinction or permits defendants to victimize vulnerable and predictably unavailable witnesses and then demand confrontation rights. As we have shown, Framing Era confrontation rights did not extend to situations in which defendants exploited young, vulnerable children who would naturally be unavailable to testify. As a matter of equity, allowing defendants to benefit procedurally from the nature of their crimes would be contrary to the era's equitable principles—it rewards the wrong at the expense of "denying [victims] the protection of the law." *See* Buller, *supra*, at 415–16; *cf.* 4 Blackstone, *supra*, at 214; 1 Hale, *supra*, at 634.

This approach is also consistent with the equitable principles that this Court has long held animate the Confrontation Clause. *See Mattox*, 156 U.S. at 243; *Reynolds v. United States*, 98 U.S. 145, 158 (1878). "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. As this Court has recognized, the common-law

considerations that defined the scope of the confrontation right included the "safety of the public." *Mattox*, 156 U.S. at 243. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of [children] is compelling." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quotation omitted).[12] When the nature of a defendant's acts extinguishes the confrontation right, the Constitution does not impede the States from securing safety for its most fragile citizens.

## II. EFFORTS TO APPLY *CRAWFORD* AND *DAVIS* TO CHILDREN'S HEARSAY HAVE LED TO EXCESSIVE EXCLUSION, CONTRARY TO FRAMING ERA PRACTICE.

Today, as in eighteenth-century England, young children are often the victims or primary witnesses of a crime. Frequently, their evidence can be

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[12] This Court repeatedly has recognized that constitutional rights must accommodate the "surpassing importance" of a state's interest in child safety. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 60–61 (1987) (limiting the right of access to exculpatory evidence); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490–92 (1983) (limiting the right to abortion); *New York v. Ferber*, 458 U.S. 747, 756–757 (1982) (preventing "abuse of children [that] constitutes a government objective of surpassing importance"); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Considerations of public policy may never allow relaxation of the "irreducible literal meaning" of the Confrontation Clause, *see Maryland v. Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting), but there is no question that "other important interests" are legitimate concerns when analyzing the reach of the Clause with respect to hearsay. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). Those important interests include a defendant's inequitable conduct. *See Davis*, 547 U.S. at 833.

presented only through hearsay, as these primary witnesses are often too young to testify or unable to endure cross-examination. Before *Crawford* and *Davis*, these witnesses' hearsay was often admitted once reliability concerns were satisfied. As we have shown, this paralleled pre-Framing English practice.

After *Crawford* and *Davis*, however, trial courts routinely have barred testimonial hearsay from unavailable child witnesses on constitutional grounds, and appellate courts have used the admission of such evidence to reverse convictions, leading to unjustifiable results.

For example, in *State v. Henderson*, 160 P.3d 776 (Kan. 2007), a three-year-old child diagnosed with gonorrhea disclosed in a videotaped interview that the defendant "touched my body and it was hurting," adding "with the ding ding," the defendant's term for his penis. *Id.* at 779–80. The mother reported that the defendant was the only man who had unsupervised contact with the victim. *Id.* at 778–79. The defendant acknowledged being tested and treated several times for sexually transmitted diseases. *Id.* at 780. When the child could not qualify as competent to testify, the trial court admitted the videotaped interview after assessing its reliability. *Id.* at 781. The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay. *Id.* at 792.

In *State v. Hooper*, 176 P.3d 911 (Idaho 2007), a mother awoke to find her six-year-old daughter locked in the bathroom with the child's father. *Id.* at 912. After questioning her child and the father, the

mother called the police. *Id.* The child described the sexual abuse in a videotaped interview, and a physician confirmed "breaking and swelling in the rectal area." *Id.* at 913. When the victim failed to qualify as competent to testify, the trial court admitted the videotape after assessing its trustworthiness. *See id.* The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay. *Id.* at 917–18.[13]

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[13] Similarly, in *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004), a mother entered the room to see the defendant pulling up his pants, whereupon her four-year-old son stated that the defendant "had me suck his pee pee." *Id.* at 488. The victim repeated the allegation in a videotaped interview but failed to qualify as competent to testify, and the interview was admitted after the trial court assessed its reliability. *Id.* The appellate court held the hearsay testimonial and reversed the conviction. *Id.* at 490–91.

In *Seely v. State*, 100 Ark. App. 33 (Ark. Ct. App. 2007), *cert. granted*, 2007 Ark. LEXIS 626 (Ark. Nov. 29, 2007), a three-year-old was incompetent to testify, but her hearsay was admitted under a hearsay exception requiring reliability. *Id.* at 35–37. The victim complained of vaginal pain to her mother, which was corroborated by physical evidence. *Id.* The child explained that "[m]y daddy put his fingers in my booty." *Id.* She repeated this to a hospital social worker, adding that "[h]e said he would whip my ass if I told." *Id.* at 37. The appellate court held the hearsay to the social worker testimonial and reversed the conviction. *Id.* at 39, 42.

In *Anderson v. State*, 833 N.E.2d 119 (Ind. Ct. App. 2005), another three-year-old was incompetent to testify, but her hearsay was admitted under an exception requiring reliability. *Id.* at 124. The victim told her grandmother the defendant was "going to let me suck his dick" and described oral sex and other abuse to a social worker and police detective. *Id.* at 121 (stating defendant "puts it in my mouth all the time" and "wet, yucky candy" comes out). The appellate court vacated the conviction on other grounds but held the hearsay testimonial. *Id.* at 122, 125–26.

Courts also have excluded or reversed the admission of out-of-court statements of child victims who were called to testify but were either unwilling or unable to do so.

For example, in *State v. Pitt*, 147 P.3d 940 (Or. App. 2006), *aff'd on reh'g*, 159 P.3d 329 (Or. App. 2007), the four-year-old victim, while living with her mother and the defendant, began to resist being alone with the defendant and disclosed sexual abuse to her mother. *Id.* at 942. She made consistent statements to a physician, a psychologist, and a forensic interviewer in a videotaped interview. *Id.* at 942–43. The physician found physical evidence of abuse. *Id.* at 942. The child also disclosed having seen the defendant sexually abuse the child's five-year-old cousin, who confirmed abuse of both girls in a videotaped interview. *Id.* at 942–43. The state presented both girls at trial, but they appeared too upset and frightened to answer questions and were declared unavailable. *Id.* at 943. The videotaped interviews of both children were admitted, but the conviction was reversed because the videotapes were testimonial and deemed to violate confrontation. *Id.* at 945–46.

In *State v. Waddell*, 2006 WL 1379576 (Kan. App. May 19, 2006), a seven-year-old disclosed sexual abuse to her grandmother, a teacher, a nurse, a day-care provider, a therapist, and a social services investigator in a videotaped interview. *Id.* at *1–3. Her videotaped disclosures included descriptions of "sexual intercourse, anal sex, the touching of her breast, and touching of [defendant's] penis," as well as an incident in which the defendant "had a knife in his hand and said he would kill her unless she

stayed." *Id.* at *2. The victim reported that the defendant showed her a picture of his naked daughter. This was corroborated when a picture of a naked young girl was found in the defendant's bedroom and the defendant's daughter testified that the defendant had sexually abused her and taken naked pictures of her when she was a child. *Id.* at *2–4. In court, the defendant admitted to abusing his own daughter. *Id.* at *4–5. The child victim, however, was unable to talk about her abuse in court. *Id.* at *5.[14] The court found the victim unavailable and admitted her hearsay after determining that it was reliable. *Id.* The conviction was reversed because the videotaped statement was testimonial hearsay. *Id.* at *9.[15]

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[14] There was no evidence that the defendant had contact with the victim after his detention. The victim testified to being scared, but not that "anyone in the room would do anything to her." Thus, the court held that statutory forfeiture was not established. *Waddell*, 2006 WL 1379576, at *9.

[15] Likewise, in *People v. Sharp*, 155 P.3d 577 (Colo. Ct. App. 2006), a five-year-old was found unavailable because she was "too traumatized." The trial court admitted a videotaped statement, in which she disclosed to a forensic interviewer her father's sexual abuse, which was consistent with what she previously had told her mother. *Id.* at 578. The appellate court held the videotaped hearsay testimonial and reversed the conviction. *Id.* at 581–82.

In *State v. Noah*, 162 P.3d 799 (Kan. 2007), an eleven-year-old broke down during the preliminary hearing. *Id.* at 802. Her hearsay was allowed under an exception requiring reliability. *Id.* at 801. She had told her brother and mother that the defendant touched her "private spot" and had recounted seven specific incidents of abuse to a social worker and police. *Id.* at 800–01. The Kansas Supreme Court upheld reversal of the conviction on the ground that the statements to the social worker and the police were testimonial hearsay. *Id.* at 806.

Similarly, in *In re S.R.*, 920 A.2d 1262 (Pa. Super. Ct. 2007), *cert. granted*, 2007 Pa. LEXIS 2951 (Pa. Dec. 28, 2007), a four-year-

Courts also have excluded or reversed admission of statements from child witnesses in murder cases where the children were the only witnesses to the murder and their accounts were wholly consistent with the physical evidence. For example, in *State v. Siler*, 876 N.E. 2d 534 (Ohio 2007), a three-year-old witnessed his father beat and then hang his mother in their garage. In response to questioning by a detective trained to interview children, the child stated that his mother was "sleeping standing" in the garage. *Id.* at 536. The child told how "Daddy, mommy fighting" in the garage had scared him. *Id.* at 537. When asked "if anyone was hurting mommy," he responded, "Daddy did." *Id.* Although officers prevented the child from seeing his mother's body, the child informed the detective that "the yellow thing" had held his mother upright in the garage. A yellow cord had been tied around his mother's neck. *Id.* When asked who put the yellow thing on her, the child responded, "Daddy." *Id.* Despite this vivid account of the murder and other corroborating evidence of threats the father made against the mother as well as past incidents of domestic violence, the conviction was reversed because the child's out-of-court statements were testimonial. *Id.* at 554.

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old was deemed unavailable after becoming "hysterical" at trial, but her hearsay was admitted after the trial court assessed its reliability. *Id.* at 1264. The mother had heard the child say "Do you want me to do it to you?" during play, and the victim disclosed that the defendant had digitally penetrated her anus. *Id.* The victim later disclosed other details of abuse to a forensic interviewer. *Id.* She also acted out sexually with her baby sister. *Id.* The appellate court reversed the conviction on the ground that the forensic interview was testimonial hearsay. *Id.* at 1269.

In *Bell v. State*, 928 So. 2d 951 (Miss. Ct. App. 2006), the victim's daughters (ages four and five) were the only witnesses to their mother's murder. The younger daughter told police officers that her father (Bell) "asked [her mother] for money" and that her mother "emptied her purse out on the floor." *Id.* at 953. She then told the officers that "Bell pushed [her mother] down over a table, broke the table . . . broke a mirror in [the] bathroom . . . [and] used a small knife to put 'blood on [her mother's] back.'" *Id.* The child's statements were corroborated by the physical evidence—police found an overturned coffee table, a purse with its contents emptied, a broken mirror in the bathroom, and multiple knife wounds in the mother's body. *Id.* at 954. Both girls were found unavailable after they were unable to endure a mock pretrial practice session. *See id.* at 956. The conviction was reversed because the statement was testimonial. *Id.* at 959.[16]

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[16] *See also Flores v. State*, 120 P.3d 1170 (Nev. 2005). The defendant's five-year-old daughter told her foster mother and police that after her step-sister "peed on her [own] pants," her mother hit her and "she never woke up." *Id.* at 1172–73. The child refused to testify against her mother and the trial court admitted her hearsay after assessing its reliability. The Nevada Supreme Court reversed the murder conviction on the grounds that the statements to police were testimonial hearsay. *Id.* at 1179–80.

Likewise, in *State v. Mack*, 101 P.3d 349 (Or. 2004) (en banc), the three-year-old brother of a two-year-old who died of "smothering by facial compression" reported in a videotaped interview that the defendant "knocked [the victim's] crib over, hit him on the head, and rubbed him on the floor." *Id.* at 349–50. The boy was incompetent to testify, and the trial court found that the hearsay was reliable, but held that it should be excluded as testimonial hearsay; the Oregon Supreme Court agreed. *Id.* at 353.

These applications of *Crawford* and *Davis* enable individuals who commit crimes against or in the presence of young children to benefit from young children's unavailability. If the child witnesses are mentally or emotionally unable to testify in court, their testimonial hearsay is categorically excluded. Although some hearsay may qualify as nontestimonial and still be admitted, the reversals in these cases highlight the insufficiency of that evidence alone. By these courts' standards, careful preservation of children's early statements on videotape is futile, and trial court screening for reliability is irrelevant. This broad view of confrontation rights does not comport with Framing Era practice. Nor does it comport with sound public policy.

## III. EXTINGUISHING CONFRONTATION RIGHTS UNDER THESE EQUITABLE EXCEPTIONS ENABLES THE STATES TO PROMOTE JUSTICE BY ADMITTING THE BEST EVIDENCE AVAILABLE.

Recognizing an equitable exception to the Confrontation Clause's application to testimonial hearsay does not mandate an *evidentiary* exception to the hearsay rule. The scopes of confrontation and hearsay are not coextensive. *Crawford*, 541 U.S. at 51. A confrontation exception does not guarantee admissibility under federal or state evidence laws. The basis for extinguishing "confrontation claims on essentially equitable grounds . . . does not purport to be an alternative means of determining reliability." *Id.* at 62.

For the equitable exception to operate, the unavailability of a witness must be demonstrated. This requires the state to make a good faith effort to present the witness at trial. *Barber v. Page*, 390 U.S. 719, 724–25 (1968). Only after good faith efforts fail may considerations of fairness set aside confrontation rights. In the absence of confrontation rights, the Constitution does not bar the States from seeking to admit hearsay evidence, so long as proper steps are taken to protect the defendant's due process interest in the reliability of that evidence.

The hearsay rule and its exceptions are founded on maximizing accuracy and reliability. *See, e.g.*, 2 Wigmore, *supra*, § 1420, at 1791. Where confrontation rights are inapplicable, the States should enjoy the flexibility to develop and apply their hearsay rules as they see fit. This facilitates admitting only the most reliable out-of-court statements, including properly vetted children's hearsay.

### A. Reliability Concerns Rather Than Equitable Considerations Motivated Post-Framing Changes in the Tender-Years Hearsay Exception.

Although modern reliability assessments advance the accuracy of children's hearsay, early to mid-nineteenth-century notions of reliability affected its admissibility. *Rex v. Brasier* required that the actual competency of all young witnesses be tested. While the inability of children to comprehend the oath heightened the necessity and fairness rationales for admitting hearsay evidence, it also undermined the apparent reliability of the child's

report—at least to the extent that nineteenth-century notions of reliability assumed that a child's report was unreliable if the child could not qualify to testify. As a result, courts looked to alternative guarantees of reliability.

Originally, reliability concerns regarding incompetent children's hearsay were addressed under the theory of res gestae, whereby the child's prompt complaints of abuse were considered part of the "transaction." 1 East, *supra*, at 444 (discussing *Brasier*).[17] Throughout the nineteenth century, however, the res gestae exception was increasingly limited. *See* David Bentley, *English Criminal Justice in the Nineteenth Century* 218 (1998).[18]

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[17] Later evidence treatises cited *Brasier* for *both* the proposition that incompetent children's hearsay should be excluded as a general rule, *and* that it could be admitted if it fell within the res gestae. *See* S.M. Phillipps, *A Treatise on the Law of Evidence* *14–15, *203 (New York, Gould, Banks, & Gould 1816) ("[I]n an indictment for a rape, what the girl said recently after the fact (so that is excluded a possibility of practicing on her), has been held to be admissible in evidence, as a part of the transaction."); 1 Thomas Starkie, *A Practical Treatise of the Law of Evidence* 308 (London, J. & W.T. Clarke 1824) (*Braiser* allows "the complaint made by a person in case of rape, or an attempt to commit a rape, immediately after the injury"). Failure to recognize the res gestae exception led to assumptions that testimonial incompetency precluded admissibility of children's hearsay. Hence, revisions to Blackstone's *Commentaries* cited *Brasier* for the proposition that "no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn." *See* 4 William Blackstone, *Commentaries on the Laws of England* 214 (R. Burn, ed., London, W. Strahan 1783). Later editors failed to recognize admissibility of any hearsay as "res gestae" until 1826. *See* 3 William Blackstone, *Commentaries on the Laws of England* 368 n.25 (W. Chitty, ed., London, Walker et al. 1826).

[18] *See also R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) (adult complaint of rape one day after event fails to qualify under res gestae; "[t]he law was not so well settled [at the time

Hence, by midcentury, children's testimonial incompetency led to assumptions in England that children's statements were unreliable. *See, e.g., R. v. Nicholas*, 2 Car. & K. 246, 248, 175 Eng. Rep. 102, 102 (1846). American courts in the mid-nineteenth century also leaned toward exclusion, but courts later began admitting hearsay from incompetent children under relaxed res gestae standards. *See* John Henry Wigmore, *A Supplement to a Treatise on the System of Evidence in Trials at Common Law* § 1761, at 170 & n.3 (1908).

Similar reliability concerns led to limits on the scope of the dying declaration exception. These reliability concerns were originally addressed by requiring the apprehension of *imminent* death. *See* 1 East, *supra*, at 353–54 (belief in imminence required "in order to preserve as far as possible the purity and rectitude of such evidence"). Doubts about the reliability of such statements led British courts to narrow the exception throughout the nineteenth century. Bentley, *supra*, at 214–18; *see also* 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 156, at 187 (Boston, Little & Brown 1842) (doubts about reliability rationale for dying declarations left the exception "to stand only upon the ground of the public necessity of preserving the lives of the community").

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of *Brasier*] as it is now"); *R. v. Tucker*, (1808), in *Select Cases from the Twelve Judges' Notebooks* 102–05 (D.R. Bentley ed., 1997) (trial court admitted child's report of rape three weeks after the event on basis of "necessity" since child could not qualify to testify, recognized the "point was new," and submitted the case to the Twelve Judges, who pardoned the prisoner without opinion).

But changes in beliefs about the reliability of dying declarations and children's hearsay, particularly those that occurred post-Framing, are not guides to defining the Confrontation Clause's scope with respect to hearsay. Quaint notions about whether a person would dare die with a lie upon his lips or how excitement stills the capacity for reflection are not constitutionally mandated limitations on the equitable principles underlying the Confrontation Clause. Once the equitable exception for considering children's hearsay is satisfied—and confrontation concerns are thus extinguished—courts need not be constrained by common law or historical approaches to assessing the reliability of hearsay. The Confrontation Clause did not constitutionalize the rules of *hearsay* at the Framing; it constitutionalized the era's *right of confrontation*. With the equitable, constitutional requirements of confrontation met, the States should be free to substitute modern reliability assessments in order to promote justice and accurate outcomes in criminal proceedings.

### B. Modern Reliability Assessments Can Assure the Trustworthiness of Children's Hearsay.

If the Court accommodates the full scope of the equitable confrontation exceptions known at common law, then courts will again be able to consider certain testimonial statements made by young child witnesses. This will improve fact-finding accuracy by facilitating the admissibility of hearsay that is both easier to assess for reliability and more likely to be reliable.

For example, many children's hearsay statements excluded by appellate courts post-*Crawford* were formal interviews captured on videotape,[19] making the statements uniquely susceptible to careful review of their trustworthiness. The videotaped statements were often admitted under special statutory hearsay exceptions that require reliability assessments.[20] Ironically, structured and professional questioning with careful documentation—which improves reliability—renders these statements "testimonial" and thus subject to exclusion under *Crawford*. *See* Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007) ("*Crawford* and *Davis* . . . defeat the admission of testimonial statements, including the highly regarded best practice of videotaping multidisciplinary forensic interviews.").

Once confrontation issues have been resolved, videotaping child interviews enables a court to directly assess the reliability of the child's statements and the bias of the interviewer. Without videotaping, interviewers have difficulty remembering the form (and therefore suggestiveness) of their questions. *See* Amye Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall*

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[19] *See, e.g.*, *Hooper*, 176 P.3d at 913; *Henderson*, 160 P.3d at 779; *Sharp*, 155 P.3d at 578; *Pitt*, 147 P.3d at 942; *R.A.S.*, 111 P.3d at 488; *Mack*, 101 P.3d at 350; *Waddell*, 2006 WL 1379576, at *2.

[20] *See, e.g.*, *Hooper*, 176 P.3d at 913; *Henderson*, 160 P.3d 780–81; *R.A.S.*, 111 P.3d at 488; *Mack*, 101 P.3d at 350; *Waddell*, 2006 WL 1379576, at *5.

*Their Interviews with Children?* 5 Psychol., Pub. Pol'y & L. 355, 369 (1999). Even careful note-taking captures far fewer details about the interview than audio- or videotaping. Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 Law & Hum. Behav. 699 (2000). Videotaping thus responds to Framing Era concerns over the reliability of children's hearsay, such as Hale's admonition that "such a relation may be falsified, or otherwise represented at second-hand, than when it was first delivered." 1 Hale, *supra*, at 635.

Nor is reliability affected by the fact that such videotaped statements may be from children too young to qualify as competent to take the oath. Contemporary research demonstrates that relying on an inability to qualify as competent to testify is a poor means for assessing children's reliability. Children may appear incompetent to take the oath because of the way in which questions are asked. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Dev. Sci. 16, 16–17 (1999). Likewise, modern research shows that children's testimonial competency does not correlate well with their honesty. Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and Its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 Law & Hum. Behav. 395, 396 (2002). Hence, a comprehensive inquiry into the circumstances of a child's statement is a more effective approach to guaranteeing reliability than that employed over 200 years ago.

In sum, it will not violate the notions of equitable fairness and moral necessity that are reflected in the Confrontation Clause to recognize that confrontation rights do not extend when the nature of the defendant's actions—such as choosing to abuse a predictably unavailable victim—ensure that evidence from the primary witnesses to the crime will be unavailable at trial. Such a rule mirrors the equitable confrontation exceptions known to the Framers such as dying declarations. Moreover, such a rule would not lead to the wholesale admissibility of unreliable hearsay. Rather, it will enable the States to scrutinize and admit the most reliable hearsay without resorting to antiquated assumptions about trustworthiness that the Confrontation Clause neither mandates nor supports.

## CONCLUSION

There is no constitutional basis for holding that confrontation requires the exclusion of hearsay statements in cases in which defendants have acted in the face of the predictable unavailability of vulnerable or very young witnesses. The articulation by this Court of a forfeiture rule that recognizes this principle will serve the Framers' intent, as well as the States' interests in accurate verdicts and the protection of children.

Respectfully submitted,

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March 26, 2008

# AMICUS CURIAE BRIEF

8

No. 07-6053

3-26-08

In The
# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari**
**To The Supreme Court**
**Of The State Of California**

## BRIEF OF THE NATIONAL ASSOCIATION TO PREVENT SEXUAL ABUSE OF CHILDREN'S NATIONAL CHILD PROTECTION TRAINING CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT


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## QUESTION PRESENTED

Whether a criminal defendant forfeits his Sixth Amendment Confrontation Clause claims on a showing that the accused has caused the unavailability of the witness, as some courts have held, or must there also be an additional showing that the actions of the accused were undertaken for the purpose of making the witness unavailable to testify?

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## INTEREST OF *AMICUS CURIAE*[1]

The National Child Protection Training Center (NCPTC) is the training arm of the National Association to Prevent Sexual Abuse of Children. The National Association to Prevent Sexual Abuse of Children supports survivors of abuse, and works to change laws and institutions to change the culture which permits abuse. NCPTC was founded in 2003 through funding from the Department of Justice Office of Juvenile Justice and Delinquency Prevention Program. Both organizations are non-profits. NCPTC serves as a national clearinghouse for child protection professionals by providing technical assistance, addressing legal issues, and researching and publishing of materials on child abuse. NCPTC also provides training to frontline professionals throughout the country.

The Court's decision in this case has enormous implications, not only for the rule of law and the ability of courts to ensure the fair administration of

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[1] *Amicus* NCPTC has given the parties more than ten days' notice of its intention to file this brief on behalf of the National Association to Prevent Sexual Abuse of Children's National Child Protection Training Center, and the parties have consented to the filing of this brief. Written statements of their consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation and submission.

justice, but also for children. Children are especially vulnerable to actions, violent or otherwise, that cause the child to be unavailable to testify. It is common in child abuse cases for the abuser to make the child unavailable to testify by telling the child not to "tell," by threatening the child, or the child's family or even pets. The abuser's use of secrecy, threats, and sometimes violence during or after the underlying crime, prevents the child from disclosing and testifying against the abuser.[2]

## SUMMARY OF ARGUMENT

I. The Confrontation Clause, and its exceptions, should be interpreted based on its original meaning at the time it was adopted. Decisions by this Court have held that forfeiture by wrongdoing is a recognized exception to confrontation based on long established usage from the time of the Founders. A review of *Reynolds v. United States*, 98 U.S. 145 (1879), and the cases it cites shows that forfeiture was used at the time of the Founders without any showing the

[2] *See, e.g.*, Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, Reasonable Efforts, vol. 1, No. 3 (2004) *available at* http://www.ndaa.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html (last visited March 1, 2008) (indicating at least twenty-seven percent of child abuse victims are threatened or told not to tell).

accused had a purpose to cause the unavailability of the witness at trial.

II. Under the original meaning of forfeiture by wrongdoing, forfeiture occurred when the accused caused the unavailability of a witness. Early cases show forfeiture could occur by "means or procurement" of the accused. *King v. Radbourne,* 1 Leach 457, 168 Eng. Rep. 330 (1787), and other cases indicate that forfeiture was used without any showing of a specific purpose to make the witness unavailable to testify. In order to protect the administration of justice, forfeiture doctrine only required that the accused's wrongful, voluntary acts caused the unavailability of the witness.

III. In 1791, statements were admitted under forfeiture by wrongdoing even when the accused had not had an opportunity to cross-examine. Arguments that an opportunity for cross-examination was necessary are not supported by a careful reading of the case law. Forfeiture by wrongdoing under the Marian statutes and the Statute of Pirates was probably used because of Parliament's concerns that witnesses were being murdered and threatened. These statutes were intended to allow use of forfeiture when an accused's acts of wrongdoing were part of the underlying crime. Dying declarations and forfeiture were mutually overlapping and not mutually exclusive confrontation exceptions. The original understanding of the necessity of the oath was as a requirement of evidence law and not as a requirement of the right of confrontation. Since the oath is based on evidence law, use of

the oath is not constitutionally required for the admissibility of unsworn statements under forfeiture doctrine.

IV. Forfeiture by wrongdoing statements should continue to be admissible without pre-trial depositions when the prosecutor makes a good faith effort to have the witness available to testify at trial. The Marian statutes, including use of forfeiture by wrongdoing, did not require the presence of the accused because the declarant was dying. The Constitution should not be interpreted to require use of depositions when the victim is dying. Dying declarations are not testimonial because a dying individual is not deliberating on how her statements might be used in court.

## ARGUMENT

### I. THE CONFRONTATION CLAUSE, AND ITS EXCEPTIONS, SHOULD BE INTERPRETED BASED ON ITS MEANING AT THE TIME ADOPTED.

In *Crawford v. Washington*, 541 U.S. 36, 43, 53-54, 61 (2004), this Court held that the Confrontation Clause, and its exceptions, should be interpreted based on its original meaning at the time the Founders adopted it. *See also Danforth v. Minnesota*, 552 U.S. ___, No. 06-8273, *slip op.* at 5 (U.S. Feb. 20, 2008) (indicating that case law before *Crawford* "stray[ed] from the original meaning of the Confrontation

Clause" and that *Crawford* relies "primarily on legal developments that occurred prior to the adoption of the Sixth Amendment"). The *Crawford* Court cited *Mattox v. United States,* 156 U.S. 237, 243 (1895), as indicating that the Sixth Amendment should be "read as a reference to the right of confrontation at common law. . . ." *Crawford,* 541 U.S. at 54.

In *Crawford,* this Court approvingly cited *Reynolds v. United States,* 98 U.S. 145 (1879), and stated "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds. . . ." *Crawford,* 541 U.S. at 62. The *Reynolds* court also used an originalist analysis of forfeiture by wrongdoing based on "long established usage" of the doctrine. *See Reynolds,* 98 U.S. at 159. This Court has repeatedly cited *Reynolds* and held that it will uphold the forfeiture by wrongdoing doctrine as used in *Reynolds* if the accused's wrongful voluntary acts cause the witness to be unavailable to testify. *See, e.g., Davis v. Washington,* 547 U.S. ___, 126 S.Ct. 2266 (2006); *Diaz v. United States,* 223 U.S. 442, 452 (1912); *Motes v. United States,* 178 U.S. 458, 471-72 (1900); and *Mattox v. United States,* 156 U.S. at 242.

*Reynolds* gives guidance in the interpretation of forfeiture doctrine. *Reynolds* was the first case in which this Court addressed the forfeiture by wrongdoing doctrine, referring to three English cases, two state court decisions, and several treatises as precedents. *See Reynolds,* 98 U.S. at 158. The Court cited *Lord Morley's Case,* 6 How. St. Tr. 770 (H.L. 1666);

*Harrison's Case,* 12 How. St. Tr. 834 (1692); *Queen v. Scaife,* 17 Q.B. 228, 118 Eng. Rep. 1271 (1851); *Drayton v. Wells,* 1 Nott. & M. 409 (S.C. 1819) and *Williams v. State,* 19 Ga. 402 (1855).

The *Reynolds* Court never stated a precise definition of forfeiture by wrongdoing or the specific requirements for its use. Instead, it indicated that its application will be based on the particular facts of each case. *Reynolds,* 98 U.S. at 159. The facts and analysis set forth in *Reynolds* support the conclusion that the accused had only to cause the witness to be unavailable in order for the forfeiture doctrine to apply.

In *Reynolds,* a bigamy case, the missing witness was the wife of the accused, and lived with him. The State attempted to serve a subpoena for the wife and the accused told the process server, when asked whether he would disclose her whereabouts, "No; that will be for you to find out." When the process server stated the wife could get in trouble the accused replied, "Oh, no she won't, till the subpoena is served upon her," and then stated, "She does not appear in this case." On subsequent attempts, the process server was unable to find the witness. The Court stated forfeiture was appropriate based on these facts. *Reynolds,* 98 U.S. at 159-60.[3]

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[3] An additional fact the Court noted was that the wife had testified at an earlier trial. *Reynolds,* 98 U.S. at 159. The issue of the oath will be addressed in this brief, *infra* at 17 n.9.

Specific facts showing how the husband caused the wife to be unavailable were never shown. But the facts did support the reasonable inference that the husband somehow had caused her unavailability. *Reynolds* indicates no finding of a specific purpose to make the witness unavailable to testify (i.e. no "intent-to-silence" requirement, *People v. Giles,* 152 P.3d 433, 441 (Cal. 2007), was considered necessary.

*Reynolds'* holding indicates that the imposition of forfeiture was appropriate based on a neglect, omission, or inference that the accused had breached his duty to the administration of justice by effecting her unavailability. *See also, e.g., Republica v. Doan,* 1 U.S. 86 (Penn. 1784) (showing purpose of flight unnecessary); 2 William Hawkins, *A Treatise on Pleas of the Crown* 143, 148, 155, 177-79 (Dublin, Elizabeth Lynch Printer Thomas Leach ed., 6th ed. 1788) (bail forfeiture did not require any showing of purpose) [hereinafter Hawkins]; 2 Matthew Bacon, *A New Abridgment of the Law* (London, 3rd ed. Printed by His Majesty's Law Printers 1768) (definition of forfeiture includes omission or neglect of a duty).

## II. UNDER THE ORIGINAL MEANING OF FORFEITURE BY WRONGDOING FORFEITURE COULD OCCUR WHEN THE ACCUSED CAUSED THE UNAVAILABILITY OF THE WITNESS.

### A. Forfeiture Did Not Require a Showing that the Accused Had the Purpose or Specific Intent to Make the Witness Unavailable to Testify at Trial.

Petitioner argues that the original meaning of forfeiture at the time of the Founding required a showing of purpose and specific intent on the part of the accused to make the witness unavailable to testify at trial. Petitioner's brief at 20-26. Petitioner focuses much of his argument on what he claims is the Founders' understanding of the term "procurement." Petitioner's brief at 26-29. The definition of forfeiture by wrongdoing that *Reynolds* adopted, based upon "long standing usage," was not limited to the word "procurement."

*Reynolds* correctly quotes *Lord Morley's Case* and *Harrison's Case* as stating that when a witness is absent, "detained by means *or* procurement of the prisoner," forfeiture by wrongdoing is appropriate if there is "competent evidence" to "supply the place of that which he has kept away." *Reynolds,* 98 U.S. at 158 (*citing Lord Morley's Case* and *Harrison's Case*) (emphasis added; citations omitted).

Petitioner fails to acknowledge that the disjunctive "or" between the words "means or procurement"

results in forfeiture being appropriate if either of these terms applies. *Reynolds* also states "This resolution . . . was followed in *Harrison's Case,* and seems to have been recognized as the law of England ever since." *Id.* (citation omitted). Since both *Lord Morley's Case* and *Harrison's Case* use the term "means," it is important to know the Founders' original understanding of that term.

The Founders understood the term "means" as "Instrument of action or performance." 2 N. Webster, *An American Dictionary of the English Language* (Johnson Corp. Reprint ed. 1970) (1828). When used in the singular, the Founders would have understood the term to be "An instrument; that which is used to effect an object; the medium through which something is done." *Id.* This definition is consistent with the use of the term in forfeiture cases. The accused effects the unavailability of the witness, justifying forfeiture by wrongdoing. If the accused is the "instrument" or "medium" which results in the witnesses' unavailability, no showing of purpose or a specific intent is necessary.

Petitioner argues "procurement" is limited to intentional or purposeful actions, but that is not the understanding the Founders had of the term. To "procure" is "[t]o cause, to bring about, to effect, to contrive and effect." *Id.* Although "to procure" can also involve intentional acts, such as to contrive, the Founders' use of the term was not limited to purposeful acts. The use of the phrase "means or procurement" in *Lord Morley's* and *Harrison's Case* makes

clear that "procurement," which follows the more general term "means," is not limited to purposeful action but can include solely causing, bringing about, or effecting something.

Another case that informed the Founders' understanding of the doctrine also supports the conclusion that forfeiture did not require a purpose to make the witness unavailable to testify. In *King v. Radbourne,* 1 Leach 457, 168 Eng. Rep. 330 (1787), the Twelve Judges[4] with Lord Mansfield absent, unanimously upheld the use of statements in a murder case based on forfeiture by wrongdoing when the out-of-court statements were not admissible as dying declarations because the victim did not appear to be apprehensive of her approaching death. *See id.,* 1 Leach at 462, 168 Eng. Rep. at 333. The attack resulting in her injuries occurred on May 31st, but her deposition did not occur until June 9th. 1 Leach at 458-59, 168 Eng. Rep. at 331. The victim languished another three weeks after the deposition before she died. 1 Leach at 460, 168 Eng. Rep. at 332.

The trial court, without specifically finding that the victim felt death was imminent when she gave the deposition, upheld the use of the statements based on *King v. Woodcock,* 1 Leach 457, 168 Eng.

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[4] The Twelve Judges' decisions were considered to be precedent, but technically they did not act as an appellate court. *See* J.H. Baker, *An Introduction to English Legal History* 139 (4th ed. 2002).

Rep. 352 (1789), apparently as a dying declaration. *See Radbourne,* 1 Leach at 461, 168 Eng. Rep. at 332. Significantly, the Twelve Judges approved use of forfeiture although no showing was made that the accused murdered the victim with the purpose of making her unavailable to testify at trial. *See* 1 Leach at 462, 168 Eng. Rep. at 333.[5]

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[5] Petitioner and *Amicus* National Association of Criminal Defense Lawyers (NACDL) argue that the existence of dying declarations at the time of the Founders forecloses the use of a forfeiture doctrine that does not have a purpose requirement, i.e., that the accused acted to make the witness unavailable to testify. Petitioner's brief at 14-17; NACDL brief at 15-22. The NACDL argues that California's version of forfeiture would "subsume the dying-declaration rule." NACDL brief at 23. Since dying declarations were not subsumed by forfeiture doctrine in 1791, NACDL argues that forfeiture requires a purpose requirement to make the witness unavailable. The NACDL argument is erroneous. In 1791, forfeiture did not "subsume" the dying declaration rule because forfeiture cases, at that time, had to be taken under oath. Dying declarations were not required to be taken under oath, but did require a showing the declarant thought death was imminent.

In *Radbourne,* the Twelve Judges upheld use of the sworn deposition under forfeiture by wrongdoing under the Marian statutes but not as a dying declaration. In *King v. Woodcock,* 1 Leach 500, 168 Eng. Rep. 352 (1789), the court upheld the statements as dying declarations but not under forfeiture because the court did not believe the Marian statutory requirements had been met. In *Wilson's Case,* 1 Lewin at 68, 69-71, 168 Eng. Rep. 962, 963 (1829), the court upheld the use of the sworn deposition under dying declarations and forfeiture by wrongdoing. As these cases illustrate, forfeiture by wrongdoing and dying declarations were not mutually exclusive confrontation exceptions but were overlapping. In some cases the courts concluded the requirements necessary to apply the exception

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*Radbourne's* approval of forfeiture by wrongdoing without a showing of a purpose to make the witness unavailable to testify continued to be the understanding of forfeiture doctrine well past the ratification of the Sixth Amendment. *See, e.g., Wilson's Case,* 1 Lewin 68, 69-71, 168 Eng. Rep. 962, 963 (1829); *Rex v. Smith,* Russ. & Ry. 339, 341, 168 Eng. Rep. 834, 835 (1817) (Twelve Judges); and *King v. Forbes,* [1814] Holt 599, 171 Eng. Rep. 354 (1814).[6]

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were not met, but this did not mean the Founders believed use of dying declarations foreclosed use of forfeiture by wrongdoing or vice-versa.

[6] If the depositions in *Radbourne* and these three other cases were not admissible as forfeiture by wrongdoing without a showing of an intent to silence, only one other rationale existed for admissibility under the Marian statues: the witness was dead for any reason. *See* Hawkins, *supra* at 605. But none of these cases required a showing of purpose to make a witness unavailable to testify at trial, whether the deposition was arguably admissible because the witness was dead, for whatever reason, or under forfeiture doctrine. It is clear that the courts interpreted the Marian statutes as allowing deposition admissibility without any showing an accused had the purpose of making the witness unavailable to testify. If Petitioner argues the depositions in these cases were admissible because the witness was dead, for whatever reason, rather than forfeiture without an intent to silence requirement, Petitioner would be acknowledging a confrontation exception that let in more out-of-court statements than forfeiture without an intent to silence requirement.

The use of forfeiture, without a showing of intent to silence was also recognized in America. *See, e.g., Rex v. Barber,* 1 Root 76 (Conn. 1775) (forfeiture appropriate without specific purpose shown on the part of Barber, although court stated that Bulloch acted so White "could not be had to testify"). *See also Fenwick's Case,* 13 How. St. Tr. 537, 583, 585, 590, 595-97, 598 (H.C. 1696) (presuming that Lady Fenwick acted at the direction of her husband in causing a witness to be unavailable to testify although no showing accused took actions purposefully to make witnesses unavailable). Secondary sources that could have informed the Founders' understanding also support this interpretation.[7]

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[7] Two of the most widely cited treatises of the time support the conclusion that a finding of purpose was unnecessary. *See* Hawkins, *supra* at 605 (statements before the justice of the peace or statements before the coroner are admissible if the accused kept the witness away "by means or procurement of the prisoner"); Michael Foster, *A Report of Some Proceedings on the Commission For the Trial of the Rebels in the Year 1746, in the County of Surrey and of Other Crown Cases* 337 (Dublin, James Moore College-Green 2d. ed. 1791) ("if kept out of the way by the prisoner or by his procurement"). *See also, e.g.,* John Keble, *A Report of the Divers Cases in Pleas of the Crown* 55 (London, Isaac Cleave 1708) (coroner deposition admissible if witness "detained by means or procurement of the prisoner"); and James Parker, *Conductor Generalis: or the Office and Duty and Authority of the Justice of the Peace* 168 (New York, Hugh Gaine Printer 1788) ("or kept away by means or procurement of the prisoner").

### B. In Order to Protect the Administration of Justice, Forfeiture Only Required a Showing the Accused's Wrongful Voluntary Acts Caused the Unavailability of the Witness.

Both Petitioner and *Amicus* NACDL argue that allowing forfeiture without a showing of a specific purpose to make the witness unavailable to testify will result in admitting any and all of an alleged victim's prior statements. Petitioner's brief at 43; NACDL brief at 25. Petitioner and the NACDL's view of forfeiture doctrine fails to acknowledge the limitations the Founders placed on the doctrine's use. The actions of the accused must cause the witness to be unavailable. *See, e.g., Lord Morley's Case,* 6 How. St. Tr. at 776-77 (when a witness is a "run away" that alone is not sufficient to support use of forfeiture unless the accused's actions caused the witness to be unavailable). Actions of the accused resulting in forfeiture must be voluntary. *Cf. Fenwick's Case,* 13 How. St. Tr. 537, 587, 589-93 (H.C. 1696) (if Lady Fenwick caused a witnesses' unavailability and if Sir. John Fenwick "was privy to it" forfeiture appropriate). The actions of the accused must be wrongful. *See, e.g., Harrison's Case,* 12 St. Tr. at 833, 851 (1692) (attempted bribery).

Whatever standard of proof may be applied, the burden of showing causation, voluntariness, and wrongful acts is on the State. *See Davis v. Washington,* 126 S.Ct. at 2280. Accordingly, the doctrine is not "forfeiture by causation" as Petitioner argues.

Petitioner's brief at 7. Showing causation alone does not result in forfeiture by wrongdoing.

Petitioner's and the NACDL's arguments are based on a misunderstanding of the original meaning of forfeiture as the Founders understood it. Forfeiture by wrongdoing, unlike forfeiture of property after a criminal conviction, is not intended to punish the accused. Charging the accused with witness tampering would not correct the wrong forfeiture by wrongdoing is intended to prevent and correct. Accordingly, the NACDL argument that forfeiture is limited to witness-tampering cases is mistaken. NACDL brief at 6, 13-14.

The accused's duty to the administration of justice does not start only when a criminal charge is filed or the witness appears on the prosecutor's witness list. By causing witness unavailability the accused interferes with a court's administration of justice whether he does so before or after charges are filed. Under forfeiture theory the unavailable witness, whether murdered or made unavailable by other acts, could have testified, but for the accused's acts.

A court's obligation to see that justice is done is not limited to what occurs in the courtroom. Part of a court's obligation to carry out the administration of justice is to uphold the rule of law. To allow the criminal a windfall simply because his voluntary wrongdoing constitutes part of the underlying crime, would impair the ability of courts to ensure "the

twofold aim (of criminal justice) . . . that guilt shall not escape or innocence suffer." *United States v. Nixon,* 418 U.S. 683, 709 (1974) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)) (first alteration in original). A court's "looking the other way," by suppressing the witnesses' out-of-court statements, would inadvertently sanction the wrongdoing; defeat the administration and ends of justice; and undermine the rule of law. *See, e.g., State v. Brown,* 285 S.W. 995, 996 (Mo. 1926).[8]

Petitioner argues that use of the doctrine denies those accused of murder the protections of the Confrontation Clause. Petitioner's brief at 43. On the contrary, no robust Confrontation Clause could exist without forfeiture by wrongdoing. The doctrine works best when it deters the accused from causing witness unavailability. If criminals know statements of any witnesses or victims will be admissible under this doctrine it may deter them from committing the crime or wrongful acts that necessitate forfeiture. An absolute confrontation right with no exceptions whatsoever would give an accused an incentive to commit murder or otherwise cause witness unavailability.

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[8] As Justice Brandeis eloquently put it, "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Constitutional rights impose duties on all Americans, not just those accused of crimes.

## III. IN 1791, STATEMENTS WERE ADMITTED UNDER FORFEITURE BY WRONGDOING EVEN WHEN THE ACCUSED HAD NOT HAD A PRIOR OPPORTUNITY FOR CROSS-EXAMINATION.

Most of Petitioner and the NACDL's arguments oppose any use of forfeiture by wrongdoing unless the unavailable witnesses' statements are under oath[9]

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[9] The Founder's original understanding of the requirement of the oath was based on evidence law not the right of confrontation. *See* James Oldham, *Truth-Telling in the Eighteenth-Century Courtroom*, 12 Law & Hist. Rev. 95, 102-07 (1994). Oldham refers to one of the leading evidence treatises of the time which stated that statements not under oath were not evidence and since hearsay statements were not under oath, they should not be considered evidence. *Id.* at 102-03; *see* Geoffrey Gilbert, *The Law of Evidence* 152 (London, His Majesty's Law Printers 3d ed. 1769). The issue was not one of confrontation but admissibility under the common law of evidence. The requirement of the oath and the right of confrontation were based on separate rules of law. A case from the Founders' era makes this clear. *King v. Powell*, 1 Leach 109, 168 Eng. Rep. 157 (1775), was a case in which the child was in the physical presence of the accused and would have been available to be cross-examined. *See Powell*, 1 Leach at 201, 168 Eng. Rep. at 157-58.

The case was reversed because the young child witness was not put under oath. *See id.* Reversal was not based on the violation of any right of confrontation; there clearly was none, but because a rule of evidence law had been violated.

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and subject to cross-examination when made. Petitioner's brief at 18-19; Amicus NACDL brief at 6-9. But if this Court were to adopt their arguments, the Court would have to reverse *Crawford*'s holding and approval of the forfeiture by wrongdoing exception to the Confrontation Clause.

Before the time of the Founders, courts interpreted the Marian statutes to allow admissibility of sworn depositions if necessity could be shown. *See* Hawkins, *supra* at 605. These depositions were considered admissible at trial even if no cross-examination or confrontation occurred when they were taken. *See, e.g.*, Geoffrey Gilbert, *The Law of Evidence* 99-100 (Garland Pub'g reprint ed. 1979) (1st ed. 1754).

The Marian statutes were probably passed by Parliament because of Parliament's concerns about the inability to prosecute felony cases when the witness had been murdered or the accused had threatened the witness. *See* John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 55 (Lawbook Exchange reprint ed. 2005) (1974). The Marian statutes reduced the discretion of

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If the Founders had considered the oath to be part of the original understanding of confrontation they would have put language to that effect in the Clause; the oath is not listed in the Confrontation Clause because it was considered a rule of evidence. *See* U.S. Const. amend. VI. Accordingly, this Court should reject arguments that forfeiture can only be used when the prior statements were taken under oath.

justices of the peace to release the accused, *id.* at 6-11, 111, and thus increased the likelihood an accused would stay in custody and be unable to threaten or murder witnesses.

The Statute of Pirates passed by Parliament in roughly the same time period was also an attempt to address the problem. *Id.* at 55. This statute, of which the Founders would have been aware, suggests that the original meaning of forfeiture by wrongdoing, as a Marian statutory exception, was intended to include an accused's acts before charges were filed and which occurred as part of the underlying crime:

> Where pirates, thieves, robbers and murders, upon the sea, many times escape unpunished . . . because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should bear witness against them in that behalf, and also such as should bear witness. . . .

27 Hen. VIII c. 4 (1535-36); 28 Hen. VIII c. 15 (1536) (Eng.).[10]

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[10] Archaic spelling has been corrected. In the Statute of Pirates, Parliament ousted Admiralty criminal jurisdiction from civilian to English common law procedure. *See* John Langbein, *Prosecuting Crime*, *supra* at 55, 81. After the Marian statutes were passed, Admiralty Courts were free to use forfeiture by wrongdoing because common law procedures, which incorporated

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NACDL argues American authorities refused to allow sworn coroner depositions taken without cross-examination outside the presence of the accused to be admissible when the deponent was unavailable at trial. NACDL brief at 10. NACDL cites four cases, which were ruled on decades after ratification of the Sixth Amendment, and suggests these cases support its argument about the original meaning of forfeiture in 1791. NACDL brief at 10. But the four cases cited by NACDL do not support its argument at all.[11]

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forfeiture, had been adopted by the Admiralty courts under the Statute of Pirates.

[11] In *State v. Campbell*, 30 S.C.L. (1 Rich.) 124 (App. L. 1844), the court stated it looks "to modern decisions . . . and by no means to the old English cases . . . " *Id.* at 30. In other words, *Campbell* reflects the "modern" view of 1844 and does not base its holding on an originalist analysis.

In *State v. Hill*, 20 S.C.L. (2 Hill) 607 (App. L. 1835), the case did not involve a statement taken by the justice of the peace or coroner, but was taken by the state attorney general. *See id.* The statements in *Hill* would not have been admissible under the Marian statutes either. *See* HAWKINS, *supra* at 605 (indicating statements had to be taken by the justice of the peace or coroner). In *State v. Houser*, 26 Mo. 431 (1858), the court ruled the statement was not admissible because the deponent was still alive. *Id.* at 439-41. The deposition in *Houser*, would not have been admissible in 1791 under the Marian procedures because the deponent was alive and no showing had been made that the witness was unable to travel. *See* HAWKINS, *supra* at 605 (stating deposition admissible only if witness who is alive is unable to travel).

In *People v. Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842), the court ruled that its holding was based on its interpretation of a state statute. *Id.* at 298. At the time of these decisions, each

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The NACDL has cited no cases from the time of the ratification of the Confrontation Clause or before 1791, in support of its argument regarding sworn coroner statements. NACDL brief at 10. American authorities show that the NACDL argument is historically inaccurate and that for decades after ratification of the Confrontation Clause, forfeiture by wrongdoing resulted in admissibility of sworn coroner statements at trial even when the deponent had not been subjected to cross-examination and the deposition was not taken in the presence of the accused. *See, e.g.,* 2 Joseph Chitty, *A Practical Treatise on the Criminal Law* 586-87 (Garland Publ'g reprint ed. 1978) (1816); S. M. Phillips, *A Treatise on the Law of Evidence* 277 n.1 (New York, Gould, Banks & Gould

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state was free to interpret the right of confrontation, under its own constitution, common law, or state statutes, in any manner it wished. *See West v. Louisiana,* 194 U.S. 258, 262-64 (1904). Accordingly, these cases tell us very little about the Founders' understanding of the Marian confrontation exceptions in 1791.

The NACDL cites three other cases which do not support its argument either. NACDL brief at 9 n.5. In *State v. Webb,* 2 N.C. (1 Hayw.) 103 (Super. 1794), the court stated that its holding was dependent on a state statute that did not allow for the admissibility of a deposition if the defendant was not present. *See id.,* 1 Hayw. at 104. *State v. Moody,* 3 N.C. (2 Hayw.) 31 (Super. 1798), merely states that because the deponent was not placed under oath before he gave the deposition, but only afterwards, the deposition was not valid. *See id.,* at 3 N.C. at 50-51. In *Johnston v. State,* 10 Tenn. (2 Yer.) 58 (1821), the court did not state that an opportunity for cross-examination was required, merely that the accused should be present because that court interpreted Marian procedures as requiring presence. *See id.,* 1 Yer. at 58-59.

1st American ed. 1816); 2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 487-92 (Philadelphia, Wells & Lilly & P.H. Nicklin 2d ed. 1828) (stating it should be a matter of "grave and serious consideration" "when the question arises," but indicating the law continued to allow use of coroner statements in 1828).

Authorities from the Founders' era flatly contradict the NACDL argument. For example, in *King v. Flemming and Windham,* 2 Leach 854, 168 Eng. Rep. 526 (1799), the Twelve Judges upheld the criminal conviction of individuals who raped a girl under the age of twelve, even though no confrontation and cross-examination had occurred at trial. *Id.* at 854-56, 168 Eng. Rep. at 526-27. No confrontation or cross-examination occurred because at the time of trial the girl was dead. *Id.* at 854, 168 Eng. Rep. at 526.

Although the accused were present at the time the deposition was taken, the opinion does not show that they were given an opportunity for cross-examination. *See id.* at 854-56, 168 Eng. Rep. at 526-27. Nor does the girl's deposition indicate that the accused were given an opportunity to cross-examine the girl. *See id.* at 854-55, 168 Eng. Rep. 526. The Twelve Judges upheld admissibility of the out-of-court statements under the Marian statutes without requiring that the accused be given an opportunity for cross-examination. *Id.* at 856, 168 Eng. Rep. at 527. The defense attorney did not even argue that the accuseds' right of confrontation or cross-examination

had been violated. *See id.* at 854-56, 168 Eng. Rep. at 527.

*Flemming and Windham's Case* shows that at least until 1799, when sworn statements were taken by the justice of the peace or the coroner, courts considered forfeiture by wrongdoing, as one of the Marian statutory exceptions, to create an exception to the right of an opportunity for cross-examination. *Flemming and Windham's Case* was cited in American legal treatises. *See, e.g.*, Zephaniah Swift, *A Digest of the Law of Evidence in Criminal And Civil Cases* 125-26 (Arno Press reprint ed. 1972) (1810); S.M. Phillips, *supra* at 279.

The entire historical analysis upon which the NACDL argument relies is simply inaccurate. Although dicta in *Crawford* states that the Marian statutory exceptions were in "derogation of the common law," *see Crawford,* 541 U.S. at 46, apparently without realizing that forfeiture by wrongdoing was one of those Marian statutory exceptions,[12] the

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[12] The original meaning of forfeiture doctrine at the time of the Founders was that forfeiture by wrongdoing, as a Marian statutory exception, was an exception to confrontation and cross-examination; however, *Crawford* states that the only exception it could find for testimonial statements in 1791 was dying declarations. *See Crawford,* 461 U.S. at 56 n.6. The Court's historical analysis is mistaken. In 1791, forfeiture by wrongdoing statements were often taken by justices of the peace, whom the Court in *Crawford* states were the equivalent of modern police, *id.* at 52, indicating forfeiture by wrongdoing statements meet *Crawford's* definition of testimonial statements. Since

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Marian statutory exceptions were not in derogation of the common law in 1791. If derogation means "the act of annulling or revoking a law"[13] the Marian statutes

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*Crawford* itself states it accepts forfeiture by wrongdoing, *Crawford* at 62, the Court's historical analysis that the Marian statutory exceptions, i.e., forfeiture by wrongdoing, were in derogation of the common law cannot be correct. The dicta about dying declarations being the only exception for testimonial statements need not pose a problem for the Court's originalist analysis if the Court simply acknowledges that there were two exceptions for testimonial statements in 1791: dying declarations and forfeiture by wrongdoing. Or the Court could do as *Amicus* Professor Richard D. Friedman suggests (see Brief of *Amicus* Professor Richard D. Friedman in Support of Petition for Writ of Certiorari in this case at 11-14 (Nov. 9, 2007) [hereinafter Friedman brief]), and incorporate the dying declarations exception into the forfeiture by wrongdoing exception which would leave only one *sui generis* exception – forfeiture by wrongdoing.

Another confrontation exception that appears to have been used in the Founders' era was an exception for children's complaints of abuse. *See* Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L. J. 1029 (2007).

[13] 1 Noah Webster, *An American Dictionary of the English Language* (Johnson Corp. reprint ed. 1970) (1828). Another definition is, "The partial repeal or abolishment of a law, as by a subsequent act which limits its scope or impairs its utility and force." *Black's Law Dictionary* 339 (5th ed. 1979).

Dicta in *Crawford* states that the right of an opportunity for cross-examination became applicable to the Marian statutory felony exceptions based on the rulings in *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (1789) and *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791). But *Dingler* and *Woodcock* only address the issue of whether the accused should be present when the declarant gave the deposition under oath (The issue of the presence of the accused is discussed further in this brief,

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could not have been in derogation of the common law. The Marian statutes were passed in the mid 1500's,[14] well before development of the common law right of confrontation occurred.

At the time of passage of the Marian statutes, the common law right of confrontation did not yet exist. Sworn deposition evidence was considered widely admissible in the mid 1500's. *See* J. Langbein, *Prosecuting Crime*, *supra* at 26. As the common law development of the right of confrontation and cross-examination occurred, forfeiture by wrongdoing and the other Marian statutory exceptions were "grandfathered" in as exceptions to the right of confrontation. Later, by equitable construction of the law, the requirement for cross-examination was applied to the Marian statutes. However, this development did not

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*infra* at 27 n.16). Neither case held that the accused should be given an opportunity for cross-examination. Given that *King v. Flemming and Windham* was decided in 1799, and the other two cases were decided before *Flemming and Windham's Case*, *Dingler* and *Woodcock* cannot be the controlling authorities *Crawford* interprets them to be. *Radbourne*, which was decided before *Dingler* and *Woodcock*, cannot reasonably be considered a case that supports an opportunity for confrontation and cross-examination. As Starkie noted, "the deposition was taken in the hearing of the prisoner, and of course the question [whether an opportunity for cross-examination was required] did not arise." 2 Thomas Starkie, *supra* at 488 n.(c). *Radbourne* and *Flemming and Windham's Case*, as decisions by the Twelve Judges would have been considered at the time to have greater authority as precedents than *Dingler* or *Woodcock*.

[14] *See* Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555) (Eng.).

occur until after the ratification of the Confrontation Clause.[15]

Analysis by scholars who have reviewed the requirement of cross-examination and the Marian statutes, whether taken by the coroner or the justice of the peace, supports the conclusion that an opportunity for cross-examination only became a common law requirement for admissibility of depositions at least a decade after ratification of the Confrontation Clause. *See, e.g.*, 5 John H. Wigmore, *The Law Of Evidence* § 1374-1375 (3d ed. 1943); David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 1800-1865, 120 (1998); David Freestone and J.C. Richardson, *The Making of English*

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[15] *Crawford* cites an 1854 case for the proposition that an opportunity for cross-examination was required at the time the deposition was taken based on an "equitable construction of the law" as part of its analysis that the Marian statutes, which included the forfeiture by wrongdoing exception, were in derogation of the common law. *See Crawford*, 461 U.S. at 47 (citing *The Queen v. Beeston*, 29 L. & Eq. Rep. 527, 529 (Ct. Crim. App. 1854) (Jervis, C.J.) (also reported at 405 Dears, 179 Eng. Rep. 782, 785 (Ct. Crim. App. 1854). *Beeston*, however, was decided over sixty years after ratification of the Confrontation Clause and does not support an originalist interpretation that this "equitable construction of the law" happened by 1791. When *Beeston* refers to an equitable construction of the law having occurred it refers to an equitable construction of the law having occurred by the time Parliament acted in 1848 to make cross-examination a requirement of Marian procedure by statute. *See* Dears at 407, 179 Eng. Rep. at 785. *Beeston* was rebutting the argument that cross-examination was only required in 1854 because of statutes passed by Parliament in 1848. *See id.*

*Criminal Law: (7) Sir. John Jervis and his Acts,* 1980 Crim. L. Rev. 5, 11 n.30-31 (1980); and W. Wesley Pue, *The Criminal Twilight Zone: Pretrial Procedures in the 1840's,* 21 Alberta L. Rev. 335, 336, 361 n.180 (1983).[16]

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[16] By 1791, some courts were beginning to apply a requirement for the accused's presence at the taking of the deposition before the justice of the peace, *see, e.g., Woodcock,* 1 Leach at 502, 168 Eng. Rep. at 353; *Dingler,* 2 Leach at 562, 168 Eng. Rep. at 384, but this doctrine only applied to justice of the peace depositions and was not for purposes of confrontation in the sense in which we use the term today. The reason the accused was supposed to be present was so he could observe the deponent giving the deposition under oath; he was not present in order to have an opportunity for cross-examination. When the justice of the peace was conducting a Marian hearing "it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the statute (citations omitted) he must examine the witnesses on oath." *Cox v. Coleridge,* 1 B. & C. 37, 43, 107 Eng. Rep. 15, 17 (K.B. 1822). If the accused had been allowed an opportunity for cross-examination the depositions would have indicated such. When depositions were taken the justice of the peace indicated on the affidavit who conducted the examination. *See* John Langbein, *Prosecuting Crime, supra* at 91. Scholars who have studied the Marian statutes have not indicated they have found any depositions where the accused was given the opportunity to cross-examine. *See id.* at 1-125. If opportunity for cross-examination had been a right under the Marian statutes then the accused should have had the right to counsel to be present to conduct cross-examination. Presence of defense counsel was not considered a right at the Marian hearing but was totally discretionary on the part of the justice of the peace well until the nineteenth century. *See, e.g., King v. Borron,* 3 B. & A. 432, 438, 106 Eng. Rep. 721, 723 (K.B. 1820) ("An attorney has no right to even be present at such an inquiry [a Marian hearing]"). *See*

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## IV. STATEMENTS SHOULD CONTINUE TO BE ADMISSIBLE, UNDER FORFEITURE BY WRONGDOING WITHOUT THE USE OF PRE-TRIAL DEPOSITIONS IF THE PROSECUTOR MAKES A GOOD FAITH EFFORT TO HAVE THE WITNESS AVAILABLE TO TESTIFY AT TRIAL.

*Amicus* Richard D. Friedman has made important contributions to confrontation jurisprudence as reflected in his advocacy of a testimonial test. *See Crawford,* 541 U.S. 36, 38, 61 (2004). But this Court should not adopt his argument for use of pre-trial depositions in forfeiture cases. *Amicus* NCPTC anticipates, based on Professor Friedman's *Amicus* Brief in Support of Petition for Writ of Certiorari in this case, at 6 n.3 and at 14 n.7, that he will argue that use of forfeiture doctrine should have a requirement that if a prosecutor "foregoes reasonable opportunity to preserve the right, as by conducting a deposition" the forfeiture rule should not apply. *Amicus* Friedman cites *King v. Forbes,* [1814] Holt 599, 171 Eng. Rep. 354 (1814), as an example, and in his parenthetical refers to *Forbes* as "establishing [the] right of the accused to be present at deposition of the dying victim." Friedman brief at 14 n.7. Actually, that is not the right established in *Forbes.*

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*also generally* Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause,* 58 Mercer L. Rev. 569 (2007).

At the time of the *Forbes* decision, whether the declarant was dying or not, sworn depositions with the accused present were considered admissible because they met the requirements believed necessary for admissibility under the Marian statutes. Dying had nothing to do with it. The victim may have been dying but the court did not hold that the accused had the right to be present at the deposition because the victim was dying. *See id.*

*Amicus* Friedman's argument is a deeply disquieting one. Opining when death may occur is a medical diagnosis and one that prosecutors are not qualified to make. Suppressing forfeiture by wrongdoing statements because the prosecutor "guessed wrong" on how long the declarant will take to die is not only ahistorical but raises a host of profoundly difficult ethical issues.

The Constitution should not be interpreted to require that a dying person, perhaps in a hospital bed and hooked up to life support equipment, is to be confronted by the person who inflicted her injuries, as well as defense counsel, the prosecutor, a bailiff, a court reporter, a victim-witness advocate, (and perhaps a judge on standby to rule on any objections), and subjected to cross-examination simply because she is taking longer to die than other victims do.

More disturbing perhaps would be the ethical conundrums created if this Court were to adopt such a forfeiture jurisprudence. If the patient's physician vetoes the plan on medical grounds, but other physicians opine it would not be harmful, would that

require suppression of statements admitted under forfeiture doctrine? What if the patient's family refuses on the reasonable grounds they want their loved one to "die in peace" and they don't want the accused to have another opportunity to "finish her off"?[17] Although *Amicus* Friedman states the requirement to take pre-trial depositions would only require doing so when there is a "reasonable opportunity" to do so, Friedman brief at 14 n.7, "reasonable opportunity" is an elastic concept, and use of such a doctrine would actually create more problems than the "problem" it is intended to solve.

*Amicus* Friedman's argument is also not persuasive if applied to declarants who are not dying. Many domestic abuse victims and child witnesses are terrified of having to testify in the defendant's presence and requiring them to do so at a pre-trial deposition, based on a "prosecutors' negligence" doctrine, would actually make it harder for them to testify at trial.[18] Particularly with young children, prosecutors

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[17] This is a serious concern. Victims have been attacked even in the highly secured settings of courtrooms. *See, e.g., State v. Min Sen Shiue,* 326 N.W.2d 648, 651 (Minn. 1982) (indicating defendant stabbed victim in the face as she testified, requiring 62 sutures to close wound).

[18] Child trauma increases as the number of times the child is interviewed increases. *See* 1 John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* § 301 at 137 n.12 (2005). Having the accused present at the deposition would be extremely frightening, perhaps traumatizing, for the child, *see id.* at § 302. [A] at 141 n.30, but would be necessary if the defendant did not waive his confrontation rights. If it was

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do not know whether the victim will be able to testify until the victim actually does so, or "freezes up." Some defense counsel will demand pre-trial depositions not so much to protect their client's confrontation rights, but as a tactic to intimidate, unsettle, and "wear down" domestic and child abuse victims.

Requiring such pre-trial depositions based on a guess as to whether the declarant will be available to testify will also require further strains on scarce judicial resources as judges will be required to "umpire" the taking of such depositions. Currently, courts will not consider a witness unavailable, dying or not, unless a prosecutor makes a good faith effort to have the witness available to testify at trial. *See, e.g., Barber v. Page,* 390 U.S. 719, 724-25 (1968). The current rule is a good one; there is no need to change it.

*Amicus* Friedman also argues that it would be misguided for the Court to hold that some dying declarations are not testimonial even when made to private persons. Friedman brief at 11-12. He argues that a dying person makes a statement to "increase the probability that her killer will be brought to justice." Friedman brief at 12 n.5. Accordingly, these statements should be considered testimonial.

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reasonably foreseeable, at the time the accused committed the acts resulting in forfeiture, that the child could be so traumatized by the accused's actions that she would be unavailable to testify – that should be sufficient to constitute causation under forfeiture doctrine.

*Amicus* Friedman's arguments are farfetched. Most dying declarations are made when the victim is simply trying to explain or describe what happened. Most dying declarations are made, as he acknowledges, "under great stress." Friedman brief at 12. Most persons who make dying declarations do not know that any statements they make are admissible as an exception to rules of evidence and the Confrontation Clause. They are not deliberating on how their statements might be used in court. Their immediate concern is to get medical attention, to get help, or perhaps to have their suffering relieved. Dying declarations to private persons simply do not meet *Crawford's* criteria or rationale to be considered testimonial. *See Crawford,* 541 U.S. at 53, 68 (indicating Founders were concerned about statements to law enforcement or government officials).

## CONCLUSION

In *Crawford* this Court indicated it was applying an analysis based on the original meaning of the Confrontation Clause and its exceptions in 1791. *See Crawford,* 541 U.S. at 43, 53-54, 61. If this Court is not to stray from the original meaning of the Confrontation Clause and its exceptions in this case, the Court should follow the Founders' understanding of forfeiture by wrongdoing and allow such out-of-court statements to be admissible without confrontation and cross-examination and without a showing of

purpose or specific intent to make the witness unavailable to testify at the time of trial. This is the original meaning of the doctrine, as the Founders understood it. The decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 07-6053 **3-26-08**

**In the Supreme Court of the United States**

DWAYNE GILES,

PETITIONER,

*v.*

CALIFORNIA,

RESPONDENT.

**On Writ of Certiorari to the Supreme Court of California**

# BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Does a criminal defendant forfeit his or her Sixth Amendment Confrontation Clause claims upon a showing that the defendant engaged in intentional misconduct that foreseeably caused a crucial prosecution witness to be unavailable to testify at trial, or must there also be an additional showing that the defendant's actions were undertaken for the specific purpose of preventing the witness's testimony?

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## INTEREST OF THE *AMICI CURIAE*

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court recognized the ongoing importance of forfeiture by wrongdoing—an exception to the general rule that, absent prior cross-examination, testimonial statements by an unavailable witness are inadmissible at trial. This case asks whether forfeiture occurs when a defendant engages in intentional misconduct that foreseeably causes a crucial witness to be unavailable to testify at trial, or whether the defendant enjoys the benefit of his wrongdoing unless the prosecution can prove that he acted with a specific intent to prevent the witness from testifying.

This question has monumental implications for the conduct of state criminal trials, and the *amici* States therefore have a substantial interest in the outcome of this case. Prosecutions for crimes including murder, domestic violence, and child abuse often depend on statements from victims and other witnesses who are unavailable to testify as a result of a defendant's intentional misconduct. In many cases, however, the prosecution will be unable to demonstrate that the defendant acted with the specific aim of preventing future testimony. Accordingly, the petitioner's narrow forfeiture rule would, at best, undermine prosecutions and, at worst, make them impossible in cases involving some of the most serious crimes. The *amici* States have a powerful stake in avoiding this inevitable result of petitioner's rule, and in protecting their citizens from the obvious effects of a rule that rewards defendants with the foreseeable benefits of violent or intimidating conduct toward victims and witnesses.

## STATEMENT

A jury found petitioner Dwayne Giles guilty of murdering his former girlfriend, Brenda Avie. J.A. 32-33, 36. Petitioner admitted he killed Avie, but argued that he acted in self-defense. J.A. 31.

1. The evidence showed that, on the evening of Avie's death, petitioner was in his grandmother's garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend Tameta Munks. J.A. 33. Shortly after Munks left, Avie arrived. *Ibid.* While Smith was in the house, she heard Avie speaking with petitioner outside. *Ibid.* Smith then heard Avie call for "Granny" several times, followed by the sound of gunshots. *Ibid.* Smith and petitioner's grandmother ran outside, where they found petitioner holding a handgun and standing approximately 11 feet from Avie, who was lying on the ground bleeding. *Ibid.* Petitioner fled the scene, and he was arrested approximately two weeks later. *Ibid.*

2. At trial, petitioner testified that Avie had a history of violent behavior and that, after arriving at his grandmother's house, she threatened to kill him and Munks, of whom she was jealous. J.A. 34. Afraid, petitioner retrieved a loaded gun from the garage and disengaged the safety. *Ibid.* Avie "charged" petitioner, and he closed his eyes and shot her because he thought she had something in her hand. *Ibid.* Avie was not carrying a weapon. *Ibid.*

3. Petitioner shot Avie six times in the torso. J.A. 33. Among Avie's wounds, one was consistent with her holding up her hand while being shot, one with her

having turned to her side, and one with being shot while lying on the ground. J.A. 33-34.

4. Over petitioner's objection, Police Officer Stephen Kotsinadelis also testified. J.A. 35. He explained that approximately three weeks before the murder he had responded to a domestic violence call involving petitioner and Avie. *Ibid.* Avie was crying, and she told the officer that petitioner had accused her of infidelity and assaulted her, choking her, punching her in the face and head, and threatening her with a knife, stating, "If I catch you fucking around I'll kill you." J.A. 35-36. Officer Kotsinadelis saw no marks on Avie but felt a bump on her head. J.A. 36. The trial court admitted Officer Kotsinadelis's testimony under section 1370 of California's Evidence Code, which establishes a hearsay exception for out-of-court statements describing the infliction of physical injury on a declarant who is unavailable to testify at trial, where the statements were made at the time of the injury and are otherwise trustworthy. J.A. 15-16 & n.1.

5. On appeal, petitioner relied on this Court's intervening decision in *Crawford* to argue that the admission of Avie's prior out-of-court statements violated his Sixth Amendment right of confrontation. J.A. 16. The court of appeals held that the statements were admissible because petitioner, by intentionally murdering Avie, had forfeited his right to assert a Confrontation Clause objection. J.A. 18.

6. The California Supreme Court affirmed. The court rejected petitioner's attempt to limit forfeiture to circumstances where the prosecution establishes that the defendant was motivated by a specific desire to

prevent testimony, because the doctrine is grounded in "the equitable principle that no person should benefit from his wrongful acts," which is equally applicable "whether or not the defendant specifically intended to prevent the witness from testifying." J.A. 54-55 (internal quotation marks omitted). The court went on to identify several limits to forfeiture's scope. First, the doctrine applies only where a witness is "genuinely unavailable" and that unavailability is "caused by defendant's intentional criminal act." J.A. 63. Second, a trial court's finding of forfeiture must be based on evidence beyond the unavailable witness's testimony. J.A. 64. Third, the forfeiture doctrine is not coextensive with the rules of evidence; accordingly, even if forfeiture is found, out-of-court statements are admissible only if they fall within a recognized hearsay exception and their probative value exceeds their prejudicial effect. *Ibid.* Finally, to ensure that the jury does not infer guilt from the court's finding of forfeiture, the jury must not be advised of the underlying determination that the defendant committed an intentional criminal act. *Ibid.*

## SUMMARY OF ARGUMENT

The cramped forfeiture rule that petitioner proposes fails on multiple grounds.[1] First, the rule cannot be squared with this Court's decision in *Reynolds v. United States*, 98 U.S. 145 (1879)—on which *Crawford* relied—or with this Court's later

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[1] One of these grounds is petitioner's misreading of Framing-era authority, but respondent and other *amici* persuasively discredit petitioner's historical analysis elsewhere, and we do not cover that same ground here.

jurisprudence. *Reynolds* announced a broad forfeiture rule, without mention of an intent requirement, and subsequent decisions followed suit. Moreover, *Reynolds* rooted forfeiture in the longstanding equitable "maxim that no one shall be permitted to take advantage of his own wrong," 98 U.S. 159, a point reaffirmed in *Crawford*, see 541 U.S. at 62 (describing forfeiture as "essentially equitable" in nature), and properly recognized by the California Supreme Court, J.A. 52. Critically, this equitable principle from which the forfeiture doctrine derives, and other, analogous variations on the same principle—including the prohibition on recovery arising from an injured party's own wrongful conduct, the "Slayer's Rule," and "Son of Sam" laws—refuse to reward wrongdoing regardless of intent.

Second, petitioner errs in relying on Federal Rule of Evidence 804(b)(6) as the supposed codification of the modern forfeiture doctrine. This rule was a targeted response to concerns over witness tampering, specifically; therefore, it has little relationship to the forfeiture doctrine recognized in cases like *Reynolds*, much less to the equitable principles that underlie that doctrine. And while some federal courts had recognized an intent requirement at the time of the rule's enactment, this was not the prevailing view, as petitioner contends.

Finally, the practical effect of petitioner's rule would be to reward wrongdoing with its foreseeable benefits, in direct violation of the equitable principle from which forfeiture derives. These real-world effects would be substantial, not only in murder cases, but also in prosecutions for child and domestic abuse, for

example, where victims are frequently unavailable to testify as a direct result of their abusers' unlawful conduct.

*Amici* States respectfully urge this Court to affirm the judgment of the California Supreme Court, which applied the forfeiture doctrine in a manner consistent with this Court's prior decisions and the equitable principles from which the doctrine derives, without rewarding defendants with the obvious and foreseeable consequences of witness abuse and intimidation.

## ARGUMENT

This Court's decisions in *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006), reaffirm the vitality of the forfeiture doctrine in modern Confrontation Clause jurisprudence. Indeed, the Court acknowledged that, if anything, the doctrine has an increasing role to play in the post-*Crawford* era. See *Davis*, 547 U.S. at 833-834 (although "[t]he [*Ohio v. Roberts*, 448 U.S. 56 (1980)] approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, * * * *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings"). However, petitioner invites the Court to limit the doctrine in a way that would reward defendants with the foreseeable effects of their intentional wrongdoing. The Court should reject petitioner's invitation for several reasons.

## I. AN INTENT-TO-PREVENT-TESTIMONY REQUIREMENT IS IRRECONCILABLE WITH *REYNOLDS* AND ITS PROGENY, INCLUDING *REYNOLDS'S* RECOGNITION THAT FORFEITURE IS ROOTED IN EQUITY.

*Crawford* not only reaffirmed the importance of forfeiture in modern Confrontation Clause analysis, but it also emphasized that doctrine's origins in equity. Forfeiture by wrongdoing is not a "means of determining reliability," the Court explained; rather, it "extinguishes confrontation claims on essentially equitable grounds." 541 U.S. at 62. The Court relied for this proposition on its prior decision in *Reynolds*, which described forfeiture in broad terms, without regard to intent:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

98 U.S. at 158. *Reynolds* provided two bases for the doctrine: first, the sweeping principle that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts," *ibid.*; and, second, the equitable "maxim that no one shall be permitted to take advantage of his own wrong," *id.* at 159.[2]

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[2] As petitioner points out, the underlying facts in *Reynolds* involved both witness tampering and a declarant who had previously been cross-examined. See Pet. Br. 22. But

The Court has addressed forfeiture only once since *Crawford*, and there again the Court stressed the doctrine's equitable grounding, "reiterat[ing] what [it] said in *Crawford*: that 'the rule of forfeiture by wrongdoing * * * extinguishes confrontation on essentially equitable grounds." *Davis*, 547 U.S. at 833 (omission in original).

As explained below, cases following *Reynolds* have reaffirmed its broad forfeiture rule, without the intent requirement that petitioner seeks to add. The recognized, equitable bases for the doctrine are likewise incompatible with such a requirement.

### A. Cases Following *Reynolds* Do Not Require Intent.

As an initial matter, we may put to the side petitioner's claim that "[t]his Court's decisions applying *Reynolds* and its progeny * * * provide no support" for the decision of the California Supreme Court but instead "confirm" a specific intent requirement. Pet. Br. 32-33. Petitioner relies on three cases citing *Reynolds*—*Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba County*, 116 U.S. 410 (1886), *Motes v. United States*, 178 U.S. 458 (1900), and *Diaz v. United States*, 223 U.S. 442 (1912), and a fourth case, *Douglas v. Alabama*, 380 U.S. 415 (1965), that cites *Motes*, see Pet. Br. 32-33—but the Court did not require intent in any of these decisions. Thus, petitioner's cases do not endorse his view of forfeiture. If anything, these cases reaffirm the broad forfeiture rule announced in *Reynolds*.

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petitioner cannot square *Reynolds*'s broad language with his effort to limit that decision to its facts.

In *Eureka Lake*, the Court acknowledged that a defendant may forfeit a right through "wrongful acts," without mention of intent. 116 U.S. at 418. The fact that defendant's agent purposefully evaded service in that case, and defendant therefore forfeited any complaint based on lack of process, see *ibid.*, does not detract from the opinion's reaffirmation of the broad rule in *Reynolds*.

And although the Court declined to find forfeiture of the confrontation right in *Motes*, this was because the witness's absence was attributable to prosecutorial negligence, rather than to any wrongdoing whatsoever on the defendant's part. See 178 U.S. at 473-474. Again, the Court reiterated the broad rule that forfeiture applies whenever a defendant seeks "'to take advantage of his own wrong.'" *Id.* at 472 (quoting *Reynolds*, 98 U.S. at 159). The Court followed the same approach in *Douglas*, where it found that a crucial witness "was acting entirely in his own interests" when he invoked the privilege against self-incrimination and thereby made himself unavailable to testify, 380 U.S. at 420, and, accordingly, the defendant simply committed no wrongdoing that worked a forfeiture of his right to confrontation.

Finally, in *Diaz*, the Court confirmed yet again that "[n]either in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." 223 U.S. at 458 (citation and internal quotation marks omitted). In that case, the principle barred defendant's Confrontation Clause claim, for defendant himself had introduced the hearsay statements about which he later complained. See *id.* at 452-453.

In sum, far from supporting petitioner's proposed, intent-based rule, this Court's decisions following *Reynolds* reiterate and reaffirm that case's intent-neutral principle, rooted in equity, that defendants may not use the Sixth Amendment to achieve the benefits of their own wrongdoing. Additional decisions, which petitioner does not address, are to the same effect. For example, in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964), Justice Cardozo, writing for the Court, discussed the defendant's right to confront witnesses, without doubting that "the privilege" of personally confronting a witness is subject to forfeiture not only "by consent" but "by misconduct." 291 U.S. at 106.

The Court followed this approach in *Illinois v. Allen*, 397 U.S. 337 (1970), where it found no Confrontation Clause violation in a trial court's expulsion of an unruly defendant from the courtroom. See *id.* at 342-343. Although the Court acknowledged that "[o]ne of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial," *id.* at 338, and "that courts must indulge every reasonable presumption against the loss of constitutional rights," *id.* at 343, the Court nevertheless rejected the defendant's complaint that both jury selection and the State's case-in-chief were conducted in his absence, see *id.* at 340-341. Relying on *Snyder*, the Court held that the defendant's misconduct had resulted in forfeiture of his confrontation rights. See *id.* at 342-343.

Similarly, in *Taylor v. United States*, 414 U.S. 17 (1973) (per curiam), the Court held that when a criminal defendant voluntarily absents himself from

trial, he forfeits his confrontation rights. See *id.* at 18-20. In reaching this conclusion, the Court rejected the defendant's view that forfeiture cannot be found "unless it is demonstrated that he knew or had been expressly warned by the trial court" that, by making himself absent, he would "effectively foreclose his right * * * to confront witnesses against him." *Id.* at 19.

In these decisions, the Court reaffirmed time and again that forfeiture follows from intentional misconduct alone, regardless of the defendant's specific aim or understanding of its effect on his trial.[3]

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[3] To be sure, when an accused is absent from his trial either because he forfeited his right to be present by his misconduct, as in *Allen*, or voluntarily, as in *Taylor*, his counsel is still available to cross-examine witnesses. But this, as the first of the modern confrontation cases observed, is not a "distinction * * * of constitutional significance." *United States v. Carlson*, 547 F.2d 1346, 1358 n.11 (8th Cir. 1976). As *Carlson* explained, "[s]ince confrontation is a right which is personal to the accused, *Faretta v. California*, [422 U.S. 806, 819 (1975)], the question in all waiver cases is whether the defendant forfeited his right to confront his accusers personally." *Carlson*, 547 F.2d at 1358 n.11. In *Taylor* and *Allen*, therefore, this Court found forfeiture based on the defendants' conduct alone, and "no significance was placed on the fact that the defendants maintained the right to confront witnesses vicariously through counsel." *Ibid.*

### B. The Equitable Principles That *Reynolds* Acknowledged As The Basis For The Forfeiture Doctrine Are Incompatible With Petitioner's Proposed Rule.

Petitioner's rule is not merely irreconcilable with *Reynolds* and this Court's later jurisprudence. It cannot be squared with the equitable principles from which the forfeiture doctrine derives. The maxim that defendants should not benefit from their own wrongdoing has a long history at common law. See, *e.g.*, *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (describing the "general, fundamental maxims of the common law" that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime"); see generally 1 Am. Jur. 2d, *Actions* § 39, at 825 (2005). This principle was "founded upon public policy, not for the sake of the defendant, but for the law's sake, and that only." *McDearmott v. Sedgwick*, 39 S.W. 776, 778 (Mo. 1897) (citations and internal quotation marks omitted). And it remains "the prevailing rule in American jurisdictions." *Feltner v. Casey Family Program*, 902 P.2d 206, 208 (Wyo. 1995).

Consistent with the equitable maxim *Reynolds* cites, and as the California Supreme Court recognized, this Court applied forfeiture in *Reynolds* without regard to the defendant's motive in procuring the witness's silence. J.A. 40-41. Critically, the same is true in other contexts where courts have applied this equitable principle to deny benefits arising from a party's own wrongdoing.

For example, courts routinely deploy the principle to bar plaintiffs from recovering damages for injuries incurred while engaging in intentional criminal conduct. See, *e.g.*, *Manning by Manning v. Brown*, 689 N.E.2d 1382, 1384-1385 (N.Y. 1997) (passenger injured in accident while riding in stolen vehicle could not recover from vehicle's owner or driver for personal injuries); *Oden v. Pepsi-Cola Bottling Co.*, 621 So.2d 953, 944-945 (Ala. 1993) (estate of minor, killed when vending machine fell on him while he was trying to steal soft drinks, could not recover from machine's owner or manufacturer on product liability theory); *Lord v. Fogcutter Bar*, 813 P.2d 660, 663 (Ak. 1991) (intoxicated man who left bar with woman and was later convicted of raping her could not recover on theory that bartender was negligent in continuing to serve him after he became intoxicated); *Glazier v. Lee*, 429 N.W.2d 857, 859 (Mich. Ct. App. 1988) (man who murdered his girlfriend could not recover on theory that psychiatrist had negligently failed to stop him).

These tort plaintiffs did not engage in criminal conduct with an eye toward a future civil recovery, yet the equitable bar on reaping the benefits of wrongdoing applied just the same. Indeed, the principle applies even where the plaintiff's injuries are attributable to wrongdoing by another. In *Cole v. Taylor*, 301 N.W.2d 766 (Ia. 1981), for example, the court held that just as a patient could not recover from her psychiatrist for negligently failing to prevent her from committing murder, her husband could not recover for loss of consortium following the patient's murder conviction. See *id.* at 768. As the court explained, public policy disfavored the husband's lawsuit because his "claim would also arise from a criminal act," and, accordingly,

"the policies should not allow indirectly for the husband what they disallowed directly for the wife." *Ibid.* Likewise, in *Feltner*—a lawsuit by foster parents and their biological son against a foster care placement program—the court held that neither the son nor the parents could recover for the son's sexual assault of a foster daughter. See 902 F.2d at 208-209. Just as in *Cole*, the court saw no basis to distinguish between the son's and the parents' claims on public policy grounds. See *id.* at 209.

Along similar lines, the maxim that one may not profit from wrongdoing is the basis for the so-called "Slayer's Rule," which prohibits a life insurance beneficiary who murders an insured from recovering under the policy. See, *e.g.*, *Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886). The rule is deeply ingrained in the common law and codified in numerous modern statutes. See, *e.g.*, *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999); *Prudential Ins. Co. v. Athmer*, 178 F.3d 473, 475-476, 478 (7th Cir. 1999); *Metropolitan Life Ins. Co. v. White*, 972 F.2d 122, 124 & n.11 (5th Cir. 1992); see generally 44A Am. Jur. 2d, *Insurance* § 1689, at 162 (2003).

Originally recognized by this Court at the time of its decision in *Reynolds*, the Slayer's Rule is premised on the view that "[i]t would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken." *Armstrong*, 117 U.S. at 600. Like Sixth Amendment forfeiture, the rule "is based upon public policy and upon the principle that no one shall be allowed to benefit from his own wrong." *Moore v. Moore*, 186 S.E.2d 531, 533 (Ga. 1971) (quoting 44 Am. Jur. 2d 653, *Insurance* § 1741); see

also *Lofton*, 198 F.3d at 850; *Prudential*, 178 F.3d at 475-476; *Draper's Estate v. C.I.R.*, 536 F.2d 944, 945 (1st Cir. 1976); *Shoemaker v. Shoemaker*, 263 F.2d 931, 932 (6th Cir. 1959). And critical for present purposes, the beneficiary's purpose in killing the insured need not have been "to obtain the proceeds of the policy"; rather, "it is sufficient that the killing" itself was the beneficiary's "intentional and wrongful act." *Moore*, 186 S.E.2d at 533 (quoting 44 Am. Jur. 2d 653, *Insurance* § 1741); *Carter v. Carter*, 88 So.2d 153, 157 (Fla. 1956) (same); see also *National Life Ins. Co. v. Hood's Adm'r.*, 94 S.W.2d 1022, 1023 (Ky. Ct. App. 1936) ("There is no difference of opinion among the courts that a beneficiary cannot recover the insurance when he feloniously kills the insured, irrespective of the purpose."). Once again, the equitable prohibition applies regardless of the wrongdoer's specific motive or intent, for the bar works simply to decouple misconduct from its reward.

Finally, many States and the federal government have enacted "Son of Sam" or "antiprofit" statutes to stop criminals from financially exploiting their own crimes. See Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 Notre Dame L. Rev. 1075, 1075-1076 (1991) (approximately 40 state legislatures and the federal government have passed such laws). These laws, which usually divert proceeds derived from media exploitations of crimes from criminal offenders to their victims, exist in part to "prevent[] criminals from profiting from their crimes." *New York State Crime Victims Bd. v. T.J.M. Prods., Inc.*, 673 N.Y.S.2d 871, 874 (N.Y. App. Div. 1998); accord, *e.g.*, *In re*

*Opinion of Justices to the Senate*, 764 N.E.2d 343, 346 (Mass. 2002); *Curran v. Price*, 638 A.2d 93, 96 (Md. 1994).

Thus, these statutes, too, bar offenders from receiving the benefit of their own misconduct, and the laws work without requiring an intent to profit later from the crime. Moreover, although courts have expressed First Amendment concerns about early versions of these laws, they have never suggested that the absence of an intent requirement is problematic. See, *e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-123 (1991) (state law not narrowly tailored to achieve compelling governmental interest in compensating victims with profits from crime); *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 725-735 (Cal. 2002) (same); *In re Opinion of Justices to the Senate*, 764 N.E.2d at 348-350 (same).

* * *

In sum, the rule that petitioner espouses cannot be squared with *Reynolds* or this Court's subsequent decisions, and it would represent an unprecedented break from the equitable principles underlying forfeiture.

## II. NEITHER FEDERAL RULE OF EVIDENCE 804(B)(6) NOR THE MODERN FORFEITURE CASES SUPPORT AN INTENT-TO-PREVENT-TESTIMONY REQUIREMENT.

In 1997, Federal Rule of Evidence 804 was amended to create a hearsay exception, entitled "Forfeiture by wrongdoing," for "statement[s] offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the

unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6). As its plain language indicates, Rule 804(b)(6) applies only where the defendant acts with intent to prevent testimony. Both petitioner and NACDL rely on Rule 804(b)(6) as support for their claim that forfeiture requires this same intent. See Pet. Br. 36-37; NACDL Br. 5.[4] They are incorrect.

Initially, this Court has long emphasized that the Sixth Amendment and modern hearsay rules are not coextensive. See, *e.g.*, *Dutton v. Evans*, 400 U.S. 74, 86 (1970) ("[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); *California v. Green*, 399 U.S. 149, 155 (1970) ("Our decisions have never established such a congruence" between the Confrontation Clause and hearsay rules). As recently as *Crawford*, the Court reiterated that just as a

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[4] The reliance by petitioner and NACDL on Rule 804(b)(6) is in tension with their historical argument. Both maintain that, at the time of the Framing, an unavailable witness's prior statement was inadmissible unless the defendant had an opportunity for cross-examination. See Pet. Br. 18; NACDL Br. 6-12. Thus, were the Court to adopt the forfeiture rule that petitioner and NACDL claim the Framing-era cases require, the Court would necessarily invalidate Rule 804(b)(6) insofar as that rule permits admission of testimonial statements without prior cross-examination. NACDL expressly acknowledges this problem but claims that the Court "need not address the constitutionality of * * * Federal Rule 804(b)(6)." NACDL Br. 13. To the contrary, should the Court accept the historical argument forwarded by petitioner and NACDL, Rule 804(b)(6) would be in jeopardy.

Confrontation Clause violation may exist even though the statement in question is admissible under modern hearsay rules, admission of evidence in violation of the hearsay rules may not violate the confrontation right. See 541 U.S. at 51.

Accordingly, the fact that Rule 804(b)(6) limits forfeiture to circumstances where the defendant acted with an intent to prevent testimony is no indication that the Confrontation Clause is so limited. In fact, as we now explain, Rule 804(b)(6) was enacted in response to a specific concern about witness tampering. It has little relationship to the forfeiture doctrine recognized in *Reynolds*, much less to the equitable principles that underlie the doctrine. And contrary to NACDL's suggestion that Rule 804(b)(6) "reflects the modern understanding of forfeiture applied in federal courts," NACDL Br. 5, the prevailing rule among courts at the time of the rule's enactment did not require intent. In short, neither Rule 804(b)(6) nor the modern cases that inspired it support petitioner's approach to forfeiture.

### A. Rule 804(b)(6) Was Designed To Address Witness Tampering, Specifically, And Does Not Alter The Scope Of Forfeiture Under The Confrontation Clause.

The note by the Advisory Committee on Evidence Rules to the 1997 Amendments to the Federal Rules of Evidence states that "Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness," and the text of the rule itself

makes clear that it is available only when the defendant acts with intent to prevent testimony. Fed. R. Evid. 804 Advisory Committee Notes (1997). The note further provides that Rule 804(b)(6) "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" *Ibid.* (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

The Advisory Committee's reliance on *Mastrangelo* is critical to a proper understanding of the rule. There, the defendant, after first unsuccessfully using threats to deter a witness from testifying, caused the witness to be murdered on his way to court. See *Mastrangelo*, 693 F.2d at 271. At trial, the defendant objected to the admission of the witness's prior grand jury testimony, arguing that neither the hearsay rules nor the Confrontation Clause permit the use of such testimony. See *id.* at 272. The Second Circuit, in an opinion by Judge Ralph Winter, rejected the defendant's Confrontation Clause argument in no uncertain terms: the court deemed the prior testimony admissible because "[a]ny other result would mock the very system of justice the confrontation clause was designed to protect." *Id.* at 273.

The facts of *Mastrangelo* reflect crime trends in the 1990s, when Rule 804(b)(6) was enacted. See Leonard Birdsong, *The Exclusion of Hearsay through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 Neb. L. Rev. 891, 904-905 (2001). These trends, which were known to Committee members, showed an increase in the murder and intimidation of federal trial witnesses, perhaps due to the advent of gang-controlled crack sales. See *ibid.*

Indeed, *Mastrangelo* itself was a drug case, the defendant having been charged with importing and distributing various narcotics. See 693 F.2d at 270. In addition, in 1994, Judge Winter, the author of *Mastrangelo*, became Chairman of the Committee and, in that capacity, told Committee members that the case had "affected him deeply and led [him] to believe that the long standing concept of forfeiture should be codified in the Federal Rules." Birdsong, *supra*, at 905-906. According to a participant in Committee meetings, the enactment of Rule 804(b)(6) "all had to do with Circuit Judge Ralph K. Winter" and the *Mastrangelo* case. *Ibid.*

The Committee minutes confirm this. The minutes from January 9 and 10, 1995, Judge Winter's inaugural meeting as Chairman, provide the first indication that the Committee "wished consideration of whether * * * [Rule 804] should be amended to cover issues raised by opinions such as *United States v. Mastrangelo*, 722 F.2d 13 (2d Cir. 1983), when the defendant has prevented the declarant from testifying." Advisory Committee on Evidence Rules, Minutes of the Meeting of January 9-10, 1995, *available at* 1995 WL 17050678, at *4. The Committee met again a few months later, and these minutes again show Judge Winter's interest in amending the rules to address the witness tampering issue presented in *Mastrangelo*. See Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5, 1995, *available at* 1995 WL 870911, at *3-4. "The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are

intimidated or incapacitated so that they do not testify." *Id.* at *3.[5]

Then-proposed Rule 804(b)(6) was discussed twice further, and the minutes from both meetings confirm the Committee's intent to target witness tampering cases like *Mastrangelo*. The minutes of the April 22, 1996 meeting show that the Committee rejected a suggestion to redraft the rule to emphasize this intent, but only because "[t]he Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed text states that the rule applies only in instances in which the party's objective was to 'procure the unavailability of the declarant as a witness.'" Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996, *available at* 1996 WL 936789, at *3-4. Then, at the June 19, 1996 meeting of the Committee on Rules of Practice and Procedure, Judge Winter stressed that the proposed rule "dealt only with witness-tampering." Committee on Rules of Practice & Procedure, Minutes of the Meeting of June 19-20, 1996, *available at* 1996 WL 936792, at *24.[6] At this time, the Rules

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[5] Further confirming the importance of *Mastrangelo*, the Committee chose a version of the rule that would not require a showing that the defendant actively participated in procuring the declarant's unavailability, and rejected imposing a "clear and convincing" burden of proof on the prosecution in favor of a preponderance standard. See 1995 WL 870911, at *3. This approach follows *Mastrangelo*. See 693 F.2d at 273-274.

[6] At one point, Judge Winter agreed to amend the committee note to make clear that the new rule applies only

Committee approved the proposed amendment and sent it to the Judicial Conference, see *ibid.*, which approved new Rule 804(b)(6), as did this Court, see Birdsong, *supra*, at 907.

In sum, both the text and the history of Rule 804(b)(6) demonstrate that it was a specifically targeted response to then-prevalent concerns about witness tampering, and, in fact, was designed as a response to *Mastrangelo*, an archetypal witness tampering case. The drafters of Rule 804(b)(6) did not even address this Court's forfeiture decisions, much less purport to define the outer bounds of forfeiture under the Commerce Clause, and nothing about the rule or its history suggests that the Sixth Amendment requires that all forfeiture rules be limited to witness tampering cases. For these reasons, Rule 804(b)(6) does not cabin the scope of forfeiture for Confrontation Clause purposes.

### B. Modern Forfeiture Cases Do Not Limit The Doctrine To Circumstances Where There Is Intent To Prevent Testimony.

The drafters of Rule 804(b)(6) thus purposefully designed the rule to address witness tampering cases, and, not surprisingly, required intent to prevent testimony, the *sine qua non* of witness tampering. This Court's decision in *Davis* is not to the contrary. *Davis* did state that Rule 804(b)(6) "codifies the forfeiture doctrine." 547 U.S. at 833. But this statement is best

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to witness tampering cases. See 1996 WL 936792, at *24. While this apparently was never done, there is no doubt that Rule 804(b)(6) applies only if there is intent to prevent testimony.

understood as dicta, for the Court had no occasion to apply the forfeiture doctrine in *Davis* and expressly took "no position on the standards necessary to demonstrate such forfeiture." 547 U.S. at 833. Indeed, the Court made no reference to an intent-to-prevent-testimony requirement, or lack thereof; its discussion of Rule 804(b)(6) was limited to its requirement that the prosecution demonstrate forfeiture by a preponderance of the evidence. See 547 U.S. at 833.

Nor, as petitioner contends, see Pet. Br. 34-36, was the prevailing view among federal courts to require an intent to prevent testimony. A survey of federal decisions undertaken shortly before the enactment of Rule 804(b)(6) demonstrates that "the intent requirement appear[ed] to be the minority rule" in federal courts at the time. John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 856 (Dec. 1996). In particular, while the First and Fifth Circuits had adopted an express intent requirement, the Second, Fourth, Eighth, and Tenth Circuits, as well as the District Court for the District of Columbia, required only that the defendant have procured the delarant's unavailability. See *id.* at 855-856 & nn. 133-143. For their part, the Eleventh and Sixth Circuits had issued conflicting opinions on the issue, so the status of the requirement in those circuits was unclear. See *id.* at 856 & nn. 144-145.

To be sure, many of these courts had no occasion to consider an intent-to-prevent-testimony requirement, specifically, see Kroger, *supra*, at 856, for the cases arose largely in the witness tampering context. See James F. Flanagan, *Confrontation, Equity, & the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1209, 1213 (Apr. 2006)

(modern forfeiture doctrine "began to emerge in 1976, principally in the federal courts, to combat rising incidents of witness tampering found in drug and organized crime cases").[7] Nevertheless, many of the holdings strongly suggest that there is no such requirement, or, at the very least, cannot credibly be understood to endorse such a requirement, as petitioner must read them to sustain his claim that Rule 804(b)(6) reflects prevailing case law requiring intent. See Pet. Br. 37.

The difference between the two approaches is perhaps best understood in terms of the distinction between waiver and forfeiture. Although the terms are sometimes used interchangeably, they are not synonymous. Waiver is "an intentional relinquishment or abandonment of a known right or privilege,"

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[7] This was not always the case, however. For example, in *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985), the defendant shot the declarant, an undercover federal agent, in an attempt to avoid arrest. See *id.* at 986-987. There was no indication that the defendant's action was motivated by an intent to prevent the agent from testifying at trial. On appeal, the Eleventh Circuit did not require a showing of specific intent, holding simply that the defendant "waived his right to cross-examine [the agent] by killing him." *Id.* at 995. Similarly, in *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997), the defendants murdered the declarant to steal his drugs. See *id.* at 654. Again, there was no intent to prevent testimony, and, indeed, the Second Circuit expressly disclaimed such a requirement, holding that "[a]lthough a finding that defendants' purpose was to prevent a declarant from testifying * * * is relevant, such a finding is not required." *Id.* at 668 (citation, internal quotation marks, and brackets omitted).

*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), while forfeiture is "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty," Black's Law Dictionary 677 (8th ed. 2004); see also Webster's Third New International Dictionary 891 (Merriam-Webster Inc. 1993) (defining "forfeiture" as "loss of something through one's own act"). While the former requires a finding by the trial court that "there is an intelligent and competent waiver by the accused," *Johnson*, 304 U.S. at 465, the latter does not. Thus, as even advocates of an intent-to-prevent-testimony requirement acknowledge, under their view, the forfeiture doctrine is more aptly characterized as one of waiver and therefore is "misnamed." Flanagan, *supra*, at 1196.

The distinction between forfeiture and waiver divides the modern-era cases. For example, in *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), the first of the contemporary decisions, the Eighth Circuit adopted a forfeiture rationale to hold that the prior grand jury testimony of a witness who refused to testify at trial because of the defendant's threats against him was admissible even though the defendant "did not explicitly manifest his consent to a waiver of his confrontation rights." *Id.* at 1352-1353, 1358. The court declined to require that the defendant have undertaken "'an intentional relinquishment or abandonment of a known right or privilege'" to find forfeiture, *id.* at 1358 (quoting *Johnson*, 304 U.S. at 464), holding instead that the confrontation right "may be lost not only by consent, but 'at times even by misconduct,'" *id.* at 1358 (quoting *Snyder*, 291 U.S. at 106).

In reaching this conclusion, the *Carlson* court refused to allow "[t]he Sixth Amendment * * * [to] stand as a shield to protect the accused from his own misconduct or chicanery," 547 F.2d at 1359, regardless of the offender's specific intent. The court expressly adopted the interpretation of *Reynolds* and successive decisions that we forward above—that *Reynolds* was substantially dissimilar factually from the case before it, but "by focusing on the defendant's conduct in each of these cases, there is a similarity and we are guided by the precept articulated in *Reynolds* that 'no one shall be permitted to take advantage of his own wrong.'" 547 F.2d at 1359 n.12 (quoting *Reynolds*, 98 U.S. at 159). Accordingly, without analyzing the defendant's intent, the court concluded that he had forfeited his confrontation right by "pursuing [a] course of conduct, which is itself inimical to the administration of justice." *Carlson*, 547 F.2d at 1358.

In *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982), the Sixth Circuit also followed a forfeiture rather than a waiver approach. On review of the district court's determination that a witness's prior statements should be admitted because the defendant had induced her not to testify at trial, see *id.* at 1197-1199, the court of appeals identified two theories to support admissibility—"either a concept of implicit waiver of confrontation or the principle that a person should not profit by his own wrong," *id.* at 1201. The court embraced the latter theory. See *id.* at 1202.

Preliminarily, the court noted that the use of waiver was "confusing" under the circumstances, because there is no requirement that the defendant have "knowingly, intelligently and deliberately relinquishe[d] his right to exclude hearsay." *Steele*,

684 F.2d at 1201 n.8. To the contrary, "[h]e simply does a wrongful act that has legal consequences * * *." *Ibid.* The court then explained its holding as based both on "public policy" and

> a principle of reciprocity similar to the equitable doctrine of "clean hands." The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant. A defendant cannot prefer the law's preference and profit from it, as the Supreme Court said in *Reynolds*, while repudiating that preference by creating the condition that prevents it.

*Id.* at 1202.

Thus, as *Carlson* and *Steele* illustrate, prior to the enactment of Federal Rule 804(b)(6), many federal courts had embraced a true forfeiture approach, that is, one that does not consider the defendant's intent in procuring a witness's unavailability.

To be sure, some courts had taken a narrower view. For example, in *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B 1982), the Fifth Circuit expressly embraced an intent-to-prevent-testimony requirement and, in so doing, adopted a rule grounded in waiver rather than forfeiture. In particular, the court applied the *Zerbst* standard to hold that "waiver" of the confrontation right required a finding that the defendant had caused the witness to be unavailable "for the purpose of preventing his testifying at trial." *Id.* at 630. But the Fifth Circuit's approach was not the prevailing, much less the universal, one.

In short, like Rule 804(b)(6), the modern Confrontation Clause cases cannot be understood to limit the scope of the confrontation right, as petitioner contends.

## III. PETITIONER'S RULE WOULD UNDERMINE PROSECUTIONS AND PERMIT DEFENDANTS TO PROFIT FROM INTENTIONAL WRONGDOING.

Many prosecutions—not only for murder, but for child abuse, domestic violence, and other offenses—rely on statements from victims and witnesses who are unavailable to testify by virtue of the offender's threats or abuse. And although witness unavailability may be a reasonably foreseeable result of the defendant's misconduct, he may not have acted with an intent to prevent testimony, or, if such intent existed, it may be impossible to prove. For these reasons, an intent requirement is likely to result in the exclusion of crucial evidence and to undermine and scuttle prosecutions, to the undeserved benefit of offenders whose own violent or threatening acts are to blame.

For example, witnesses to and, especially, victims of domestic violence and child abuse face myriad pressures not to testify—all of which are the inevitable result of the abusers' intentional misconduct, even if it is not specifically designed to prevent testimony. To start, these crimes generally occur in secret, with the victims themselves as the only witnesses. See, *e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim."). As a result, if the victims do not testify, the offenders likely will not be prosecuted or convicted.

Yet many domestic violence and child abuse victims are unwilling or unable to cooperate in the prosecution of their abusers. Battered women recant or are unavailable to testify 80-90% of the time. See Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. Cal. L. Rev. 213, 235-236 (Nov. 2005); Tom Lininger, *Prosecuting Batterers after* Crawford, 91 Va. L. Rev. 747, 751 (May 2005); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002). And although child sexual abuse has been reported by 27% of women and 16% of men, only about 10% of such abuse is even brought to the attention of police. See Advocates for Youth, *Child Sexual Abuse I: An Overview, available at* http://www.advocatesforyouth.org/PUBLICATIONS/factsheet/fsabuse1.htm.

Domestic violence victims may not testify for several reasons. Most tragically, their abusers may have killed them. Alternately, they may fear retaliation, suffer physical terror at seeing their abuser, be economically or emotionally dependent on their abuser, be afraid that the State will remove children from a household that has experienced domestic violence, or suffer "learned helplessness" as a result of repeated abuse. See Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *in Domestic Violence Cases*, 38-DEC Prosecutor 14, *15-16 (Nov./Dec. 2004); Lininger, *supra*, at 769-770; Percival, *supra*, at 236-237. Indeed, trauma is perhaps the most pervasive aspect of domestic violence undermining

victims' ability to testify. Abuse by an intimate partner is often associated with psychological effects, such as Post-Traumatic Stress Disorder ("PTSD"), which may cause victims to refuse to testify, say they cannot remember, become non-responsive, or recant prior accusations. See Krischer, *supra*, at *15-16; Lininger, *supra*, at 812-813.

Similarly, child abuse victims are often unwilling or unable to testify, assuming the abuse comes to light at all. Children are threatened by their abuser in more than one-fourth of child sexual abuse cases. See Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual & Physical Abuse Cases: Final Report* 93, 122 (1993). And although these threats are likely to deter victims from testifying, their purpose is more often to keep the abuse secret in the first place, not to prevent testimony at some hypothetical future trial. See Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, & Confrontation*, 82 Ind. L. J. 1009, 1019 (Fall 2007). Even in cases where child abuse victims are not threatened, they are nevertheless likely to be afraid of their abusers or otherwise unable to testify as a result of the abuse. Like domestic violence victims, child abuse victims are highly susceptible to trauma. Research shows that as many as 50% of assaulted individuals, including children, have had PTSD. See Tom Harbinson, *Using the* Crawford v. Washington *"Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases, Reasonable Efforts* (Am. Prosecutor's Research Inst., Vol. 1, No. 3, 2004), *available at* http://www.ncdsv.org/images/In%20Child%20Abuse%20Cases%20–Harbinson.pdf.

In sum, the pressure not to testify experienced by victims of and witnesses to domestic violence and child abuse is substantial and well known. Regardless of whether those who commit such crimes act with a particularized intent to prevent testimony, there should be little question that this is a foreseeable result of their threats or abuse. In addition, the statements of their victims and witnesses are often crucial to the prosecution. As a result, if this Court were to adopt the narrow view of the forfeiture doctrine advocated by petitioner, the Court would dramatically limit prosecutors' ability to obtain convictions in what are already widely regarded as among the most difficult crimes to investigate and prosecute.[8]

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[8] Petitioner envisions a parade of horribles, in which "an entire class of criminal defendants" is denied the protections of the Confrontation Clause even in cases where "the alleged victim is physically able to appear and testify." Pet. Br. 43-44. But these concerns are readily addressed by enforcement of the requirements, recognized by the California Supreme Court, that the defendant have engaged in intentional wrongdoing that foreseeably prevented a witness from testifying at trial, and that the declarant truly be unable to testify. J.A. 63. To the extent that concerns remain, it should be remembered that the requirements of the Confrontation Clause are but a minimum. Legislatures may—and routinely do—provide additional protections through the hearsay rules.

## CONCLUSION

The decision of the Supreme Court of California should be affirmed.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

5

No. 07-6053

3-19-08

In The
# Supreme Court of the United States

DWAYNE GILES,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of The State Of California**

## BRIEF OF AMICUS CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF RESPONDENT


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## INTEREST OF AMICUS CURIAE

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide. This case is of importance because it will define the law of forfeiture by wrongdoing as an exception to the Confrontation Clause.[1]

## SUMMARY OF ARGUMENT

The elements required for forfeiture by wrongdoing are voluntary act and causation. Voluntary act

[1] The parties have consented to the filing of this brief. No counsel for any party authored the brief in whole or part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

and causation are the only historical elements set out in *Reynolds v. United States*, 98 U.S. 145 (1878). *Reynolds* should be followed because none of the historical cases require any additional elements. Proximate cause, and its inherent foreseeability inquiry, limits forfeiture by wrongdoing.

## ARGUMENT

### I. THIS COURT RECOGNIZES AN EXCEPTION TO THE CONFRONTATION CLAUSE WHERE THE DEFENDANT VOLUNTARILY ACTS TO CAUSE THE UNAVAILABILITY OF A WITNESS.

#### A. *REYNOLDS* CLEARLY IDENTIFIED FORFEITURE BY WRONGDOING AS REQUIRING AN "ACT" WITH A "VOLUNTARY" MENTAL STATE THAT CAUSES WITNESS UNAVAILABILITY.

This Court in *Reynolds v. United States* held that:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own *wrongful procurement*, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own *wrongful acts*. It grants him the

> privilege of being confronted with the witnesses against him; but if he *voluntarily keeps the witness away*, he cannot insist on his privilege.

98 U.S. at 158 (emphasis added).

*Reynolds* is clear that "procurement" of the absence of a witness results in forfeiture of the accused's Confrontation Clause right. In the second sentence, above, the Court replaced "procurement" with "acts." *Id.* Plainly the Court intended procurement to be the *acts* of procuring. If there were any lingering doubt about this, it is resolved by the sentences immediately following, where "wrongful act" is rephrased as "voluntarily keeping the witness away." *Id.* Thus, the mental state expressly required by *Reynolds* for the forfeiture by wrongdoing exception to the Confrontation Clause is a "voluntary" mental state accompanied by the act of keeping the witness away. Nowhere in *Reynolds* is specific intent required as an element of forfeiture by wrongdoing.

The *Reynolds* court was well aware of the difference between the mental states of "voluntary" and "specific intent." Only one term before *Reynolds*, in a case alleging a violation of United States law, this Court drew the distinction between voluntary and willful intent:

> Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word 'wilfully,' says Chief Justice Shaw, 'in

> the ordinary sense in which it is used in statutes, means not merely 'voluntary,' but with a bad purpose' 20 Pick. (Mass.) 220. 'It is frequently understood.' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sec. 428.

*Felton v. United States*, 96 U.S. 699, 702 (1877) (punctuated as in original).

Clearly understanding the distinction between "voluntary" and "wilful" mental states, this Court in *Reynolds* described "wrongful" as a "voluntary" mental state, without any requirement of specific intent. Thus, the plain meaning and precedent of *Reynolds* are that "voluntary" is the only mental state constitutionally required under the forfeiture by wrongdoing exception to the Confrontation Clause.

### B. THE *REYNOLDS* "VOLUNTARY" MENTAL STATE STANDARD IS UNCONTRADICTED BY PRIOR CASES OF ENGLISH OR AMERICAN COURTS.

This Court, in *Crawford v. Washington*, abrogated Confrontation Clause precedent only where precedent conflicted with the history of the Confrontation Clause and its exceptions. 541 U.S. 36, 62-65 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980)). In abrogating *Roberts*, *Crawford* cited *Reynolds* with approval, stating, " . . . the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining

reliability." 541 U.S. at 62 (parenthetical in original). Thus, unless in 1879 *Reynolds* misread the history of the exception, the clearly delineated "voluntary" mental state standard in *Reynolds* should not now be overruled.

*Reynolds* did not mistake the common law history. No express specific intent requirement is required in the historical common law cases involving forfeiture by wrongdoing. None of the prior English or American cases mention any specific intent (or wilfulness) requirement for the forfeiture by wrongdoing exception. Absent plain historical contradiction, *Reynolds'* express "voluntary" mental state requirement should not be overruled.

Despite *Reynolds'* expressly articulated standard of "voluntary," Petitioner hopes to add a modern specific intent requirement. Finding no express specific intent requirement in *Reynolds*, or any prior common law case, Petitioner urges that the use of the term "procure" *implies* a specific intent requirement. In essence, Petitioner argues that because there is a possibility that the definition of "procure" may involve specific intent, specific intent is required. Not only is the argument weak, it is eliminated by *Reynolds* where "procurement" is identified as "acts." 98 U.S. at 158.

Far from inevitably implying a specific intent requirement, the term "procure" can properly be used solely to reference the act of procuring. Petitioner concedes this point. Petitioner's Brief, at 27. Thus, while specific intent *might* be implied from the term

"procure," it is not a necessary implication. Moreover, the term "procurement," the precise term used in *Reynolds*, was defined at the time as "[t]he *act* of procuring or obtaining; obtainment 2. A *causing* to be effected." Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828) (emphasis added). While act and causation are present, notably missing is any intent requirement.

"Procurement" is not the only act and cause that suffices to establish forfeiture by wrongdoing. *Lord Morley's Case*, as cited with approval in *Reynolds*, provides two categories of act and cause: "means or procurement." 98 U.S. at 158. While not defined in the first edition of Webster's Dictionary, the second edition defines "means" as "[i]nstrument for gaining an end; as, by this *means*." Noah Webster, *American Dictionary of the English Language* 702 (2d ed. 1869) (italics in original). Just 12 years after the *Reynolds* decision "means" was defined in Black's Law Dictionary, as "[t]he instrument or agency through which an end or purpose is accomplished." (1st ed. 1891). "Means" describes act and causation, but not a specific intent mental state. Nor is a specific intent element readily implied. Within Black's definition of "means," "purpose" is a distinct concept. *Id.* Even if "means" could be defined as sometimes including the notion of "purpose," it would be but one possible definition, thus an insufficient basis to overrule *Reynolds'* expressed mental state of "voluntary."

A specific intent requirement is unsupported by the historical cases.[2] First, are the cases that provide insufficient facts upon which to make any assessment that specific intent was present and which do not articulate any specific intent requirement. For instance, in *Lord Morley's Case*, 6 How. St. Tr. 769, 777 (HL 1666), a witness who did not appear at trial told others that the Lord Morley's trial was to be shortly, but that he would not be there. "The court not thinking this evidence sufficient, the deposition was not read." *Id.* It is far from clear that any absence of intent ultimately denied the admissibility of evidence, as no act of the accused was shown to have caused the witness' absence. Moreover, no specific intent requirement was mentioned. In *Williams v. Georgia*, 19 Ga. 402, 1856 WL 1804 (Ga. 1856), the state court cited favorably to the rule as set out in *Lord Morley's Case*. No facts were recited in that case sufficient to determine whether the defendant was involved in the act of keeping the witness away, much less that he intended to do so. Nor is any specific intent requirement mentioned in the case. Similarly, in *Queen v. Scaife*, 17 Q.B. 237 (1851), the appellate court, in conclusory fashion, stated that: "There was evidence also that [the witness] was kept away by the procurement of Smith." *Id.*

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[2] Petitioner declares these cases "plainly require" a specific intent requirement. Petitioner's Brief, 20 (" . . . the doctrine of procurement . . . that originated in *Lord Morley's Case* – plainly required that the defendant act with a specific intent to prevent the witness from testifying."). To the contrary, one searches the cases in vain for any "plain require[ment]" of specific intent.

While the trial court concluded there was "procurement," there are no facts recited on which to base a present day conclusion that specific intent was present or that the court meant anything more than the act of procuring. Furthermore, there is no specific intent requirement articulated in the opinion. Finally, in *Drayton v. Wells*, 1 Nott & McC 409, 10 S.C.L. 1819 WL 692, 693 (S.C. 1819), the court, in *dicta*, recited those circumstances in which testimony could be admitted when the witness was unavailable, including where the court was satisfied that the witness had been "kept away by a contrivance of the party." Notably, no specific intent requirement is mentioned.

Second, are the cases providing some facts with which to make a modern day assessment of the presence of a mental state, but where the courts do not articulate any specific intent requirement. In *Rex v. Barber*, 1 Root 76, 1775 WL 8 (Conn. Super. 1775), a witness "was sent away by one Bullock, a friend of [defendant's], and by his instigation; so that he could not be had to testify before the grand jury." *Id.* Rex is a four sentence opinion and there is no content to suggest that more than a voluntary act and causation is required. The term "instigation" establishes "voluntariness" as readily as "specific intent," and the term "sent away" describes an act. Similarly, in the *Harrison's Case*, 4 William and Mary 833 (1692), the court stated "there has been evidence given of ill practice to take him out of the way, and therefor his affidavit is read as evidence." *Id.* at 868. The facts recited in that case reveal the use of agents to render the witness

unavailable. No mention was made of any specific intent requirement. The term "ill" cannot readily be transformed into a "wilful" (i.e. specific intent) standard.

Thus, the historical cases do not provide material for anything but tenuous speculation that "procurement" implies specific intent. These cases provide no basis to overrule the "voluntary" mental state standard expressly articulated in *Reynolds*. Indeed, the clearest historical case law about the meaning of "procurement" in the context of forfeiture by wrongdoing is within *Reynolds* itself where "procurement" is reiterated as "acts." 98 U.S. at 158.

Finally, it may be that Petitioner is confusing the use of agents to keep the witness away with proof of a specific intent requirement. The use of agents is present in some of the historic cases. When an agent is directed to do something, there may be evidence of a different quality or quantity than if the accused acted alone. This evidence may consist of the communication from the accused to the agent and the actions of the agent. It may well be that the mere use of an agent provides persuasive evidence of the presence of specific intent. This observation is not, however, to be confused with relying upon the existence of agents to prove a *requirement* of specific intent. Indeed, the use of an agent provides similarly persuasive evidence that the "voluntary" mental state articulated in *Reynolds* is present. Thus, the presence of agents in the historical cases does not provide historical evidence

to overrule *Reynolds*' "voluntary" intent requirement and replace it with a specific intent requirement.

## II. PROXIMATE CAUSE ALSO DELINEATES THE BOUNDARIES OF FORFEITURE BY WRONGDOING.

In addition to the "voluntary" mental state requirement, proximate cause bounds the forfeiture by wrongdoing exception. This Court in *Crawford* recently identified forfeiture by wrongdoing as based in equity. 541 U.S. at 62 ("The rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds.") (citing *Reynolds*, 98 U.S. at 158-59).

Proximate (or legal) cause is a requirement of causation in equity.[3] Determining the boundaries of

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[3] *See, e.g., Allen v. Lewis*, 255 F.3d 798, 800-01 (9th Cir. 2001) (equitable tolling of statute of limitations for filing habeas corpus claim requires the existence of circumstances that were the proximate cause of a petitioner's untimeliness); *Woolard v. JLG Industries Inc.*, 210 F.3d 1158 (10th Cir. 2000) (applying state law, where A was proximate cause of 40% of B's losses, A is barred from equitable indemnity claim); *Trytko v. Hubbell, Inc.*, 28 F.3d 715 (7th Cir. 1994) (constructive fraud is "an equitable theory of relief" requiring "injury to the complaining party as a proximate cause thereof"); *Kelly v. Fahrney*, 242 Ill. 240, 89 N.E. 984, 989 (1909) (no standing in a court of equity unless the action complained of "was the proximate cause" of the loss); *First Nat. Bank v. Blewett*, 89 S.W. 2d 487, 489 (Tex. Civ. App. 1935) (equitable estoppel where plaintiffs are negligent and are the "proximate cause" of their loss); *Noland v. Law*, 170 S.C. 345, 170 S.E. 439, 440 (1933) (equitable rights not to be preferred

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proximate cause has historically been, and is today, a judicial endeavor. *See Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) ("The 'zone of interests' test performs the same role as many other judge-made rules circumscribing the availability of damages in tort and contract litigation-doctrines such as foreseeability and proximate cause . . . ").

Relevant to the issue of how a proximate cause standard bounds the forfeiture by wrongdoing exception is foreseeability as an element of proximate cause. Just one term before *Reynolds*, this Court stated: "In order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been *foreseen* in light of the attending circumstances. *Milwaukee & St. P.R. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) (emphasis added). Thus, the constitutional boundary of forfeiture by wrongdoing can be drawn consistently with *Reynolds* by requiring proximate cause, including foreseeability.

As an exception to the Confrontation Clause, forfeiture by wrongdoing is unique because its nature and scope define constitutional parameters. In the forfeiture by wrongdoing context there is no historical

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over rights at law where equitable plaintiff contributes as a "proximate cause" to her loss).

or Supreme Court precedent expressly discussing proximate cause. Because of the constitutional context there is no concern that this Court's development of a unique proximate cause doctrine in forfeiture by wrongdoing will adversely affect proximate cause doctrine developed outside the Confrontation Clause context. Thus, the proximate cause requirement provides this Court with a considerable judicial tool for limiting forfeiture by wrongdoing.

In sum, forfeiture by wrongdoing is essentially equitable; proximate cause is an element of equity; the boundaries of proximate cause are traditionally drawn by courts; proximate cause may be uniquely crafted to fit the constitutional exception context of forfeiture by wrongdoing; foreseeability is an element of proximate cause; and factual differences among cases will determine the presence of foreseeability. The "voluntary" mental state requirement provides yet another boundary. The judicial tools provided in *Reynolds* of voluntary act and proximate cause bound the forfeiture by wrongdoing exception to the Confrontation Clause.

## CONCLUSION

The decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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